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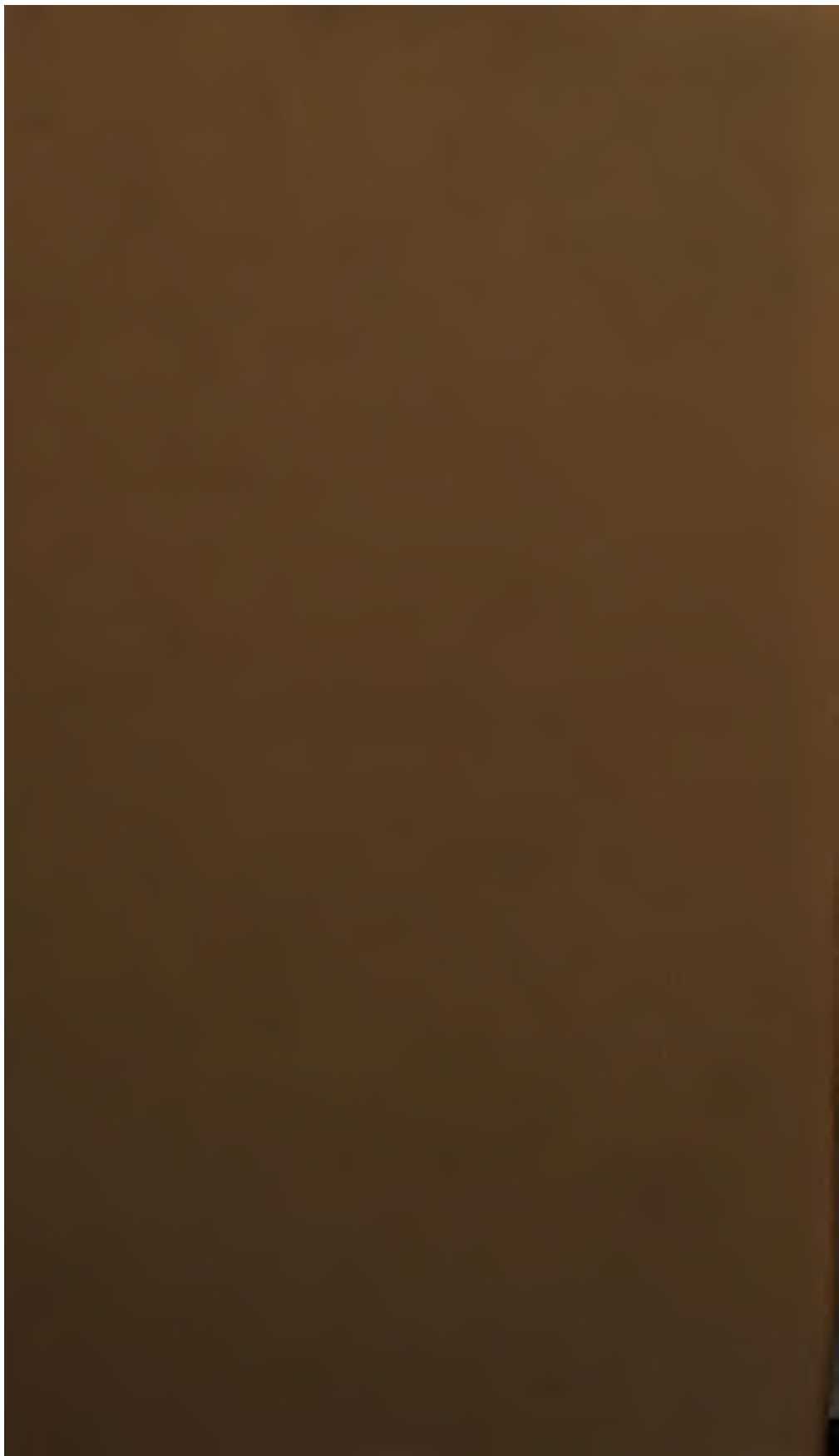
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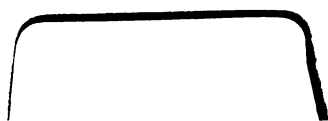
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REPORTS OF CASES

ARGUED AND DETERMINED IN

47

THE COURT OF CHANCERY,

87

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS,

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, Reporter.

VOL. VIII.

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1873.

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CHANCELLOR

DURING THE PERIOD OF THESE REPORTS,

Hon: ABRAHAM O. ZABRISKIE.

VICE-CHANCELLOR,

Hon. AMZI DODD.

CLERK IN CHANCERY,

HENRY S. LITTLE, Esq.

Judges of the Court of Errors and Appeals.

EX OFFICIO JUDGES.

HON. ABRAHAM O. ZABRISKIE, CHANCELLOR.

“ MERCER BEASLEY, CHIEF JUSTICE.

“ JOSEPH D. BEDLE,

“ VANCLEVE DALRIMPLE,

“ GEORGE S. WOODHULL,

“ DAVID A. DEPUE,

“ BENNETT VAN SYCKEL,

“ EDWARD W. SCUDDER,

} Associate Justices
Supreme Court.

Judges Specially Appointed.

HON. EDMUND L. B. WALES,

“ JOHN CLEMENT,

“ FRANCIS J. LATHROP,

“ AMZI DODD, (vice KENNEDY, term expired,) from March 22d, 1872.

“ CALEB S. GREEN, (vice OLDEN, resigned,) from February 27th, 1873.

“ SAMUEL LILLY, (vice OGDEN, term expired,) from March 26th, 1873.

This volume contains the opinions delivered in the Court of Chancery, from February Term, 1872, to February Term, 1873, both inclusive, and in the Prerogative Court, during the same period; and commencing with the unreported opinions in equity cases in the Court of Appeals, of March Term, 1872, concludes with November Term, 1872.

The opinions in the Court of Chancery embrace all those delivered by Chancellor Zabriskie up to the expiration of his term of office.

No opinions in equity cases were delivered in the Court of Appeals at March Term, 1873, so that the only opinions remaining unpublished are those of June Term, 1873, which have not yet come to the Reporter's hands.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1872.

ABRAHAM O. ZABRISKIE, Esq., CHANCELLOR.

AMZI DODD, Esq., VICE-CHANCELLOR.

WHEELER and GREEN *vs.* GEORGE KIRTLAND and others.

WHEELER and GREEN *vs.* JOHN KIRTLAND and others.

G. W. KIRTLAND *vs.* JOHN KIRTLAND and others.

1. If a man, when insolvent or in debt, advances money as a gift to his wife or her father, they being at the time ignorant of the indebtedness or insolvency, and the donee receives the money in good faith, supposing that the donor was perfectly solvent and that the gift could not injure his creditors, present or future, and was not intended for such purpose, and purchases property or enters into business with the money, but afterwards, upon learning of the embarrassment of the donor, pays him back in full the amount received, there is no fraud in such transaction, or any other ground to infer or create a trust for future, or even existing creditors, in the property purchased and its advance, or in the profits of the business, after the money is returned, or even while it is kept in good faith.

2. A trust is held to result by operation of law, where one purchases land with his own money and takes the conveyance in the name of another; in such case the title is deemed to be in trust for him who advanced the money.

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3. If one purchases land, and takes the title in the name of his wife or child, it will be held to be a settlement on the wife or an advancement to the child, unless it is shown to have been otherwise intended, and no trust will result. But in such case, if the purchaser takes the deed in the name of his wife or child for the purpose of defrauding or delaying creditors, and not for the purpose of making a settlement or advancement, a trust will result to the purchaser, and the land be liable to his debts.

4. When the person to whom the conveyance is made makes the bargain for the purchase for his own benefit, and obtains part, or even the whole of the purchase money from another, who knows that it is to be paid for a conveyance to the grantee for his own benefit, no resulting trust can arise.

5. Where a wife purchases real estate for her own benefit, and the purchase is understood to be made for that purpose by the husband, and he advances the money therefor as a gift, no resulting trust is thereby created in him for the benefit of his creditors.

6. When the person to whom the conveyance is made pays part of the purchase money, no trust results to any one who advances the residue, unless the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced, is shown to have been paid for some specific part or distinct interest in the estate, for some aliquot part. A general contribution of a sum of money toward the entire purchase is not sufficient.

7. A mortgage given by a husband to a trustee for his wife, after he had become a member of a firm of which she had gone out, to secure to her the capital which she had contributed to the firm, but which had become insolvent before she left it, is void as against creditors of the firm.

8. A mortgage given by a father to secure to a son, money of the son used by the father in the business of the firm, though given when the firm was insolvent, is valid.

9. Mortgage reformed, by substituting "heirs" for "successors," it having been the evident intention to mortgage the fee. Such reformation will not affect a subsequent judgment, the record of the mortgage being the only notice at the entry of the judgment, and that notice being of a conveyance for life only.

These three suits were brought on for final hearing together, each upon bill, answer, replication, and proofs.

Wheeler and Green, the complainants in the first two suits, had, on the 16th day of December, 1869, recovered judgment in the Supreme Court of the state against the defendants, George Kirtland and John Kirtland (who had been partners under the name of Kirtland & Co.,) for \$68,246. By an execution on this judgment they had levied upon a lot of

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land of six and one-half acres, in Orange, known as the Halsted homestead, the title to which was in the name of Emily G. Kirtland, the wife of George Kirtland; and on a tract of land and messuage, the property of John Kirtland, also in Orange, encumbered by two mortgages to George W. Kirtland, one for \$4000 in his own right, and one for \$75 to him as trustee for Catharine Kirtland, the wife, and Jared T. Kirtland, the son of John Kirtland, and by a judgment confessed by John Kirtland to George W. Kirtland, in Essex County Circuit Court, for \$16,714.42.

The bill in the first suit seeks to have the judgment of the complainant declared a lien on the Halsted homestead, on the ground that the same was purchased and paid for by George Kirtland out of the assets of the firm when insolvent, and the title taken in the name of his wife to protect it from the debts of the firm, and to hinder and defraud their creditors.

The bill in the second suit alleges that the mortgage held by George W. Kirtland on the premises of John, as trustee for Catharine and Jared, was voluntary, and given without consideration when John Kirtland and his firm were insolvent, and seeks to have it declared fraudulent and void as against the complainants and their judgment.

The third suit is by George W. Kirtland to foreclose his mortgage for \$4000, and his mortgage as trustee. It also seeks to have that mortgage reformed by correcting a mistake of the scrivener who, in drawing it, had substituted the word "successors" for "heirs," after the name of the mortgagee, in the granting clause; and further, to have the amount due on his judgment made out of the sale of the mortgaged premises. The defendants, Wheeler and Green, contest the *bona fides* and validity of both these mortgages, and of the judgment, and allege that they are all without consideration, and intended to delay and defeat creditors.

Mr. B. Williamson, for Wheeler and Green.

Mr. C. Parker, for the Kirtlands.

Wheeler and Green v. Kirtland.

THE CHANCELLOR.

I shall first consider the question with Emily G. Kirtland, as to the Halsted homestead. She was the daughter of M. O. Halsted, an old, respectable, and wealthy resident of Orange, who had lived on this property for more than forty years. Emily had been born there, and had resided on it until she was married to George Kirtland, in September, 1863, and still continues to reside there. She continued, after her marriage, to reside there in the family of her parents until March 5th, 1864, when the place was conveyed to her in fee by her father; after that, she and her husband conducted the establishment, and her father and mother boarded with them. For some time before her marriage her father had talked of selling this place, and asked \$25,000 for it. In the winter after her marriage, and for some two months before the conveyance, she had been bargaining with her father for the purchase of this place, and concluded the bargain for the price of \$25,000, of which \$5000 was to be paid by charging it as an advancement to her, and \$20,000 was to be paid in cash. This sum was advanced by her husband by a check of his firm for that sum, intended as a gift to her. She was the only remaining daughter or child, the others having been previously married. Her father gave her the furniture in the house. Mr. Halsted never drew the money for which the check was given, or used it in any way, but handed it the next morning to George Kirtland, who took it back to the firm, giving Mr. Halsted credit in their books for the amount, \$20,000. The firm from time to time bought bonds for Mr. Halsted to that amount, their business being that of bankers and stock and exchange brokers in the city of New York. These bonds were left with Kirtland & Co., and were used by them as collaterals for raising money, under an understanding with Mr. Halsted. On the 10th day of November, 1864, Kirtland & Co. failed, and stopped payment, and on the 25th made an assignment of their New York assets for the benefit of certain creditors.

On the 24th day of November, 1864, two weeks after the

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failure, Mr. Halsted advanced on a mortgage of the homestead \$14,000, which was handed over to George Kirtland for the payment of the debts of the firm, and on the 4th of November, 1865, he loaned \$6000 more on a second mortgage on the same property, which was handed to George for the same purpose. These sums, or by far the greater part of them, were used in paying the debts of the firm, part in paying a debt for which \$10,000 of Mr. Halsted's bonds were pledged, part in payment of a debt for which \$17,000 of borrowed Tennessee bonds had been pledged, and the rest for other debts.

Mrs. Emily G. Kirtland retained possession of her homestead, and the lands having risen much in value, sold different parcels of it for large prices, and with these moneys, and the amount which came to her as her share of the estate of her father, who died in 1866, being about \$20,000, she has nearly paid off the mortgages. The judgment of Wheeler and Green in this state was obtained more than five years after the failure, and after these sales and payments.

The above statement of facts is the conclusion to which I have arrived from consideration of the testimony, and is fully established by the evidence.

I shall assume it also as established by the evidence, that the firm of Kirtland & Co. were, on the 5th of March, 1864, largely insolvent, although upon this point there is contradictory testimony. I shall also assume that George Kirtland knew of the insolvency. He denies, under oath, that the firm was then insolvent, or that he thought that it was; and his ignorance of, and incapacity for business displayed in his testimony, if not simulated, is so great that perhaps I should credit him as to his belief.

It is shown to my satisfaction that his wife Emily and her father did not know of, or suspect, the insolvency of the firm at the advance of the \$20,000. His wife supposed he was wealthy and doing a good business. This is shown by her responsive answer and testimony, and confirmed by the fact that the complainants, Wheeler and Green, and other dealers

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who trusted them with millions, treated and dealt with them as responsible and wealthy. A young wife could not be supposed to suspect her husband in matters as to which she saw experts in business, not related by blood or affinity, trusting him with such amounts. There is no reason to doubt her testimony. That upon the failure, two-thirds of the advance, and, within a year after, the residue of it, was repaid by the wife to the firm from whom it was taken, is established and not disputed.

Wheeler and Green were creditors of the firm at the time the \$20,000 was advanced. The firm were their bankers; they deposited their moneys with them, and drew for them as needed. Their account was very active; the debt due to them from the firm at its failure was not the same debt as was due at the advance to Mrs. Kirtland. It may be that there was a time when their account was overdrawn, and the firm owed them nothing. But as at its failure, it owed them over \$40,000; as the dealing was continuous, and the overdraft, if any, accidental, I shall assume their rights to be the same as to this property, as if some indebtedness to them had continued from the advance to the failure.

The question then presented is this: if a man when insolvent or in debt, advances money as a gift to his wife or his son, they being at the time ignorant of the indebtedness or insolvency, and they purchase property or enter into business with this money, but afterwards, upon learning of the embarrassment of the donor, pay back in full the amount received, does this transaction impress the property purchased, or the profits of the business in which they engaged, with such an indelible trust for creditors that at any distance of time afterwards the creditors can claim the property purchased and its advances, or the profits made in such business, both before and after refunding the advance?

I am of opinion that if the donee in such case received the money in good faith, supposing that it was advanced by a person perfectly solvent, and that the gift could not injure his creditors, present or future, and was not intended for

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such purpose, and the amount is afterwards repaid in full to the source from which it was received, there is no fraud or other ground to infer or to create a trust for future or even existing creditors, in the profits of the business or advance of the property after the money is returned, or even while it is kept in good faith. There is no privity or confidence between the donee and the creditor, or any other thing out of which a trust can arise. Fraud may create a trust; but here is in the donee neither actual nor legal fraud.

I have no doubt that a voluntary conveyance or gift of property, made at this time by Kirtland to his wife, even if received in perfect good faith, would have been void as against his creditors. If the gift had been in money she could have been compelled to repay it; but if it had been repaid or refunded before a creditor obtained a judgment or other lien, she could not again be compelled to pay it to the creditor, unless the payment was made so as to aid her husband in defrauding creditors. It is not necessary to decide whether if the money had not been repaid, the property purchased with it and held by the donee would be in trust for creditors beyond the amount of the advance.

The rights of creditors should be protected. No property of the debtor should be allowed to be conveyed away and held by a donee without consideration or in trust for the debtor. It should be followed in whosoever hands it may be, except that of a *bona fide* purchaser for value, and given to the creditor. Beyond this the creditor has no right. And there are other persons who have rights to be protected as well as creditors. The wife or son of one who has been unfortunate or attempted to defraud, should not, to gratify a feeling of vindictiveness against a wrong-doer with whom they are so nearly connected, be stripped of what fairly belongs to them. When the creditor has his three thousand ducats he must not seek for the penalty of the pound of flesh or for a single drop of blood.

There can be little doubt, from the great rise in its value

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since, that this property, in March, 1864, when it was conveyed, was worth more than \$25,000. At that time the depressing effect of the first years of the war was being relieved. The increase of money by the immense circulation of irredeemable legal tender notes had raised the money value of land by reducing the value of money, and if this property in 1860 was worth \$25,000, it was worth much more then. The price of \$5000, charged by a father to a cherished daughter, was very likely, to his knowledge, below its value, and the conveyance intended as a favor to her. It would be gross injustice to take from that daughter, anxious and uniting with her father to preserve the home of her childhood, all the benefits, advantages, and profits of that purchase above the naked \$5000, and hand them over to the creditors of her husband, to whom they never, in law, equity, or right, belonged.

I know of no precedent for declaring the honest recipient of a temporary gift, fully returned, a trustee for the benefit of creditors. The only precedent I find for declaring such a trust is where the property was purchased by the husband himself, and the deed taken in the name of his wife—not for her benefit, but to be held in her name for the benefit of the husband to defraud his creditors.

A trust is held to result by operation of law, where one purchases land with his own money and takes the conveyance in the name of another; in such case the title is deemed to be in trust for him who advanced the money, for the presumption is that he intended to purchase for his own benefit. So where one employs an agent, and furnishes him with money to purchase land, and the agent purchases the land with this money, and takes the title in his own name, a trust results for the principal; but not if one employed as an agent purchases the land with his own money. But if one purchases land and takes the title in the name of his wife or child, it will be held to be a settlement on the wife, or an advancement to the child, unless it is shown to have been otherwise intended, and no trust will result. 2 *Story's Eq. Jur.*,

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§§ 1201-1205; *Guthrie v. Gardner*, 19 *Wend.* 414. But in such case, if the purchaser takes the deed in the name of his wife or child, for the purpose of defrauding or delaying creditors, and not for the purpose of making a settlement or advancement, a trust will result to the purchaser, and the land be liable to his debts.

In *Belford v. Crane*, 1 *C. E. Green* 265, this doctrine was applied by Chancellor Green, and a trust was held to result for the husband, and the land held liable to his debts. But it is put by the Chancellor on the ground that the whole of the property of the husband was put in the name of his wife to place it beyond the reach of his creditors. He says: "The transfer was not made by deed of settlement. There was no declaration of a purpose by the husband to appropriate a specific portion of his property for the use of his wife, but the property from time to time was purchased in the name of his wife, and a house subsequently erected thereon with the means of the husband." And in that case, as the Chancellor declared, every vestige of property that the husband owned was in the name of his wife; and it was held that "the land having been purchased with the money of the husband, there is a resulting trust in his favor." But the reasoning of the case shows that had the land been purchased with a specific sum set apart for a settlement upon the wife, the conclusion would have been different. The gift might have been declared void as against creditors, but no trust could have resulted.

In *Guthrie v. Gardner* the same doctrine was held and applied by Chief Justice Nelson. In that case the husband purchased and paid for the land and took the deed in the name of the wife, for the avowed purpose of keeping the property from his creditors; and the Chief Justice held that it was perfectly clear from the facts that the husband had no intent to make provision for his wife, and a resulting trust arose to the husband; that the fee thus passed to him, and was subject to his debts.

But this is not a case of a purchase made by a husband in

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the name of his wife. It was a purchase made by the wife herself, of her father, of the family homestead for her own benefit; she herself made the bargain. I fully believe her testimony on this point. She got from her husband a large part of the purchase money which she paid for the conveyance. There is no authority for the creation of a resulting trust from such facts. When the person to whom the conveyance is made makes the bargain for the purchase for his own benefit, and obtains part, or even the whole of the purchase money from another, who knows that it is to be paid for a conveyance to the grantee for his own benefit, no resulting trust can arise. Else any stranger or banking institution that advances the money to make a purchase that turns out advantageous, might take the property and the profit of the purchase as *cestui que trust*. In this case the purchase was made by Mrs. Kirtland for her own benefit, and was understood to be made for that purpose by her father and her husband. The \$20,000 was advanced by her husband as a gift to her. There is no principle or authority on which this can be declared to create a resulting trust in him for the benefit of his creditors.

There is another principle that will prevent in this case a resulting trust. When the person to whom the conveyance is made pays part of the purchase money, no trust results to any one who advances the residue unless, in the language of Justice Hoar, in *McGowan v. McGowan*, "the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced, is shown to have been paid for some specific part or distinct interest in the estate—for some aliquot part, as it is sometimes expressed." He declares "that a general contribution of a sum of money toward the entire purchase is not sufficient." 14 *Gray* 119. To the same effect are the decisions in *Crop v. Norton*, 2 *Atk.* 74; *White v. Carpenter*, 2 *Paige* 240, and *Sayre v. Townsend*, 15 *Wend.* 647. The doctrine is commented on and approved in *Broune on Frauds*, § 86.

In this case there was no intention to purchase in fifths,

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nor was the advance intended to represent four-fifths, or any aliquot part of the estate; it was the intention of the father to convey the whole estate, upon the payment of \$20,000 in cash, and to charge her \$5000 only on the advancement, even if the surplus of value was twice that sum.

For these reasons I am of opinion that no trust by reason of any fraud of Mrs. Kirtland, and no resulting trust, did arise or could arise, either for her husband or his creditors. And even if it was a case on which a resulting trust might have arisen, the fact that the whole amount advanced was repaid by her to her husband, for his firm, from which the money was taken, and accepted by them four years before the complainants acquired any lien upon the property, and while the partners had full power to settle their own affairs, would have released the property from the trust. If she had given a mortgage to the firm for this \$20,000, payment in 1864 and 1865, if made without fraud, would have discharged it, even although the partners had squandered the money and not applied it to the payment of debts.

In this case the great increase of value has accrued since the \$20,000 was refunded and accepted, and it would be gross injustice to declare that the creditors of her husband were entitled to this, if the doctrine of trusts had required it.

The view I have taken of this question being on the assumption that Wheeler and Green were creditors at the time of the advance of the \$20,000, and that they continued such until the failure, relieves me from the investigation of the accounts and examinations of the piles of firm ledgers, and accounts exhibited and produced to show that the debt to them at the time of the advance was paid off and discharged long before the failure, and that no part of their present claim is for any debt then existing, and that about the 1st of July, 1864, the firm for a period of some days owed them nothing—questions not without doubt; and also from discussing and applying the question of law, whether an advance made to a wife or child can be questioned by a subsequent creditor, if all debts existing at the time of the advancement

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have been paid and settled, and there is no actual intent by the advancement to defraud subsequent creditors.

The bill against Emily G. Kirtland and others must be dismissed.

The suit against Catharine Kirtland, Jared T. Kirtland, and their trustee, George W. Kirtland, presents a different question. Catharine Kirtland was a partner in the firm of Kirtland & Co. at its inception in 1861; her son George was the other partner. She advanced \$5200 as capital; George advanced the small amount of \$247, and his skill in the business. John Kirtland, the husband of Catharine and the father of George, could not enter the firm, as he was engaged in settling up the affairs of an insolvent firm of which he was a member. His wife went in with his consent, and put in \$5200, the amount of a legacy which his brother Jared had originally bequeathed to him, but by a codicil had given to his wife, evidently because of the risks of the business in which John was engaged. In January, 1864, John having, by compromising with the creditors of his former firm, become free from his embarrassments, took the place of his wife in the firm of Kirtland & Co. She went out of the firm and he went in. The name of the firm was unchanged, and the business was continued in the same books, on which no indication of the change appeared. The firm appears to have been insolvent at this time. John paid his wife nothing for her interest; he gave her no note or security, and made no agreement to pay her. No promise could arise by implication of law, as her interest was worth nothing. The old firm of which she was a member would owe her nothing, as her capital had been spent and the firm was insolvent. Had there been assets, she would have been entitled to her proportion of the capital and her equal share of the profits.

Had John Kirtland, when he took the place of his wife in the firm, agreed to pay to her for her interest \$5200, and secured it by note or mortgage, although the interest was worth nothing the transaction would have been valid. Neither

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he nor his property were then liable to the debts of the firm, and he had power to make such contract, whether provident or improvident. But this was not done. The capital remained in the firm, credited on the books as capital, and in no other way. A bargain to allow her to withdraw her entire capital in cash from the concern, when insolvent, would not be valid as against creditors. A new credit to her of the amount of the capital, if it had been made, would not be legal as a means to effect that end. In November, 1864, John having become a member of the firm, and his individual property as well as his partnership property being liable to the debts of the firm, he could not legally encumber his property to secure to his wife a sum which neither he nor the firm legally owed her—a sum which she having contributed as capital belonged to the creditors. The mortgage to George W. Kirtland, as trustee, so far as the \$6000 secured for Catharine Kirtland is concerned, must be declared void as against the complainants, Wheeler and Green. But it is valid to secure the sum of \$1500 to Jared T. Kirtland. This was his money, used by his father John, in the business of the firm. It was a just and honest debt to him, for which John Kirtland could give a mortgage or other security to give him preference over other creditors. In that suit there must be a decree confirming the mortgage to George W. Kirtland, so far as the \$1500 secured to him as trustee of Jared T. Kirtland is concerned, and declaring the same void so far as relates to the \$6000 secured to him as trustee of Catharine Kirtland.

This view disposes of every question about which there can be serious doubts in the third suit by George W. Kirtland for foreclosure of his mortgages, except the reforming the mistake in the mortgage to him as trustee. The making that mortgage to G. W. Kirtland and "his successors," instead of "his heirs," is a mistake of the scrivener. It was, beyond question, the intention of John Kirtland to mortgage the fee, and the mortgage must be reformed by substituting the word heirs for successors. But this reforming will not affect the judgment of Wheeler and Green.

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There was no other notice to them at the entry of their judgment than the record of this mortgage. That gave notice of a conveyance for the life of the trustee. If a mortgage is by mistake given for \$1000 instead of \$10,000, and is so recorded, a subsequent purchaser cannot, by correcting such mistake, be deprived of property which he purchased on faith of the record. The advance of the \$4000 by G. W. Kirtland to his brother John, for which the note was given, secured by the first mortgage, is established, and there is no evidence to throw doubt upon the fact or the *bona fides* of the mortgage; and the judgment for \$16,714.42 is regular, and not impeached. The complainant in that suit is entitled to a decree for the sale of the mortgaged premises; the several encumbrances to be paid out of it in the order of their dates, and the residue, if any, to be paid to Wheeler and Green upon their judgment.

 AKERS' EXECUTORS vs. AKERS and others.

1. The residuary clause, after giving all the residue of the real and personal estate upon the death of the testator's wife, to his six children by name, equally to be divided between them, and to their heirs and assigns forever, concludes with these words: "But it is my will and desire that the amount so bequeathed to my daughters above named shall be so secured to them that they only receive the benefit on the portion so bequeathed to them, and that their receipts be requisite to draw the amount of interest due them on the amount bequeathed to them, interest payable half yearly; at their decease the property so bequeathed to go to their children or legal heirs." *Held*, that the daughters were not entitled to have the principal paid to them, but that the principal of each daughter's share must be invested during her life, and the interest only paid to her half yearly; and that at her death the principal goes to her heirs, and for that end must be retained and kept by the executors.

2. "Children" will not be construed as synonymous with "heirs," when it would conflict with testator's intention. That intention will be effected by applying the word "children" to the personal property, and the word "heirs" to the lands.

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This cause came on for hearing upon bill and answer. The suit was brought by the executors to have a construction of the will of their testator, and for directions in the execution of their trust. The defendants claim that they are entitled to have the principal of the residue of the personal estate paid over to them immediately. The executors have doubts of this, and are advised that the daughters of the testator are entitled only to the interest on their respective shares, and that the principal must be retained by the executors and paid at the death of each daughter to her children. The will is dated February 2d, 1856. The sixth clause of the will on which the question arises, after giving all the residue of his real and personal estate, upon the death of his wife, to his six children by name, equally to be divided between them, and to their heirs and assigns forever, concludes with these words: "But it is my will and desire that the amount so bequeathed to my daughters above named, shall be so secured to them that they only receive the benefit on the portion so bequeathed to them, and that their receipts be requisite to draw the amount of interest due them on the amount bequeathed to them, interest payable half yearly; at their decease, the property so bequeathed to go to their children or legal heirs." The residue of the personal estate was ascertained and settled by the Orphans Court of the county of Essex, at the allowance of the final account of the executors, on the 7th of March; 1871, to be \$73,615.10. One of the sons having died in the lifetime of the testator, his share went to the other five by a provision in the will, and each of the three daughters is entitled to the one-fifth of this residue. None of the daughters had children at the making of the will.

Mr. J. W. Taylor, for complainants.

Mr. W. S. Whitehead, for defendants.

THE CHANCELLOR.

This will is inartificially drawn. The draftsman must have been ignorant of the rules of law. But he has drawn it

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so as to leave little, if any, doubt as to the intention of the testator. No one, I think, can read the clause in question without seeing that the testator intended that the principal of each daughter's share should be invested during her life, and the interest only paid to her half yearly, and that on her own receipt; and that at her death the principal should go to her heirs, and for that end should be retained and kept from the daughters by the executors.

This intention, like any intention of a testator clearly shown by the language of his will, must be followed in the construction and execution of the will, unless it is contrary to the settled rules of law. The law will not permit a testator, however clearly he intends it, to create a perpetuity or to entail personal estate.

It is contended that this gift to each daughter, and at her death to her children, creates an estate tail in her. One of the resolutions in *Wild's case*, 6 *Rep.* 17, is relied on for this. I think counsel has misapprehended the resolution relied on, and another resolution in that case is the other way. The devise in that case was to Rowland Wild and his wife, and after their decease to their children.

The resolution relied on for the defendants is this: "If A devises land to B and his children or issues, and he hath not any issue at the time of the devise, the same is an estate in tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, therefore such words shall be taken as words of limitation as much as children or issue of his body;" and in like case it had been adjudged an estate tail. A second resolution is this: "If a man devises to A and his children or issue, and he then have issue, then his express intent may take effect according to the rule of the common law;" and therefore in such case they shall have but a joint estate for life. The third resolution was this: "That if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children,

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or the remainder to their children, in this case although they have not any child at the time, yet every child which they shall have after, may take by way of remainder, according to the rule of the law ; for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife."

The second resolution only applies when the gift is to a man and his children. If such children were then in being they would take jointly with their father. But if they were not in being, the law, to give the devise effect, construes children like heirs, a word of limitation. But it is carefully, in the other two resolutions, distinguished from the cases where the gift was to the children *after the decease* of the parent, as in this case. In Wild's case the gift to children was after their parents' decease. It was held that Wild and his wife had only an estate for life, and that their children took only an estate for life, and not an estate tail. And by the third resolution, which is upon a proposed case just like the present, where the children were born after the will, it went to every child born afterwards by way of remainder, and not to the heir-at-law. All the other cases relied on by counsel in support of this position are upon devises like that supposed in the first resolution in Wild's case—that is, devises to A and his children—and not like the devise in this case, or the devise to Wild and his wife for life, and after their decease to their children. The resolutions in Wild's case would make this gift to each daughter for her life, and at her death to her children for life only ; in this state, by statute, the children take the fee. This would apply to both real and personal property.

It is further insisted that the word heirs, in the gift over to children or heirs, being a word of inheritance, must create an estate in fee in the lands ; and in the personal estate coupled and mixed up with it in the same gift, must make the gift in like manner absolute.

I will assume the position taken by Sir John Leach in *Malcolm v. Taylor*, 2 Russ. & Myl. 416, in a judgment after—

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wards affirmed by Lord Brougham on a re-hearing, that "it is to be supposed where real and personal estate are given together, that the testatrix had the same intention with respect to the funded property and the real estate.

In real estate, the words used in this will, (if the word children is expunged or considered as swallowed up in the word heirs in the gift over,) would not give a fee in the lands. It would have had that effect under the rule in Shelley's case; but since the act of 1820, incorporated in the present act of descent as section ten, the rule in Shelley's case has been abolished in this state, so far as devises are concerned. In 1843, a gift to a person for life, and at her death to her heirs, would give a life estate only to the devisee, and at her death it would go to her children in fee; and this in the case of *Den d Hopper v. Demarest*, 1 Zab. 525, was determined to be a vested estate in the children. The words of the fourth clause, if they had been used for the personal estate only, would have given the daughter only an estate for life, and the limitation over would have taken effect, not being too remote for the limitation of personal estate. If, because real estate is included in the same gift, this must have the same construction as to the personal as to the real estate, the gift is for life, with limitation over at the death of the life tenant to her children—a limitation allowed by the rules of law. This is the view taken in 2 *Jarman on Wills* 506, of the effect of the English statute of 1837, which declares that in wills of persons dying after that, the words "dying without issue" shall be taken to mean dying without issue living at the death of the first taker. These words, in a devise over, had been held before to create an estate tail in lands by implication. And under the rule that words which as to lands would create an estate tail, when applied to personal estate would make the gift absolute, because it could not be entailed—these words, in a limitation over of personal estate, made the first bequest absolute. The learned author remarks that "the statute will, when applied to personalty, operate to restrain such words from passing the absolute

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interest, and also to bring within the compass of the rule against perpetuities, the ulterior bequest depending on such contingency."

The act of 1820 had the same effect upon devises of real estate here that the English statute of 1837 did there, and should have the same reflected effect upon gifts of personal estate in changing the application of the abrogated rules to them.

The intention of the testator as expressed is, above all things, the guide of the courts in the construction of the will, and the courts will not be backward in taking advantage of anything that abrogates an iron rule of law preventing the giving effect to such intention.

But there is no reason for holding that in this case the word "children" is to be taken as synonymous with heirs, or that it is swallowed up by it. A more reasonable construction would be to give effect by applying the word "children" to the personal property, and the word "heirs" to the lands, according to the rule, *reddendo singula singulis*. The word "heirs," when applied to personal property alone, is often held to mean the legatees in the will, and when applied to both real and personal estate, to mean both legatees and devisees, in accordance with this rule; and if it had been the only word here, this meaning could be given to it. But where both are used, each should be given its proper effect, by applying it to the estate to which its settled meaning refers.

Either view brings to the same conclusion. The daughters are entitled to a life estate only in the personalty. It must be invested by the executors, and the interest of each daughter's share paid to her half yearly in person.

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GREEN and wife vs. RICHARDS.

1. A bill by a husband and wife, praying performance of one or the other of two agreements—the one a parol agreement made with the husband, and the other a written agreement made with the wife—both for the conveyance by the defendant of the same premises upon the same terms, is not multifarious.

2. Such bill might have been demurrable for a misjoinder. But here the error is not such that the court will refuse relief on this technical objection, after the defendant has allowed the cause to proceed to hearing.

3. Taking possession of the premises, under a parol agreement for their conveyance, is such part performance as will take the case out of the statute of frauds, and support the suit on the agreement; part payment will not.

4. A memorandum endorsed on a receipt, &c., as follows: "This is to show that I agree to sell to Mrs. G. house and lot No. 71 Ferry street, for the sum of \$2500, and that when there is \$500 paid, and the back rent, I will give her the deed and take a mortgage for \$2000. [Signed.] T. E. R.," is a contract certain and definite, except as to whether the mortgage should draw interest or not. But there being no agreement for time, and the purchaser not being entitled to any credit, a court of equity will presume it to have been the intention of the parties that the mortgage should be made payable on demand, and enforce the contract.

Argued on final hearing upon pleadings and proofs.

Mr. F. Stevens, for complainants.

Mr. C. F. Hill, for defendant.

THE CHANCELLOR.

This suit is to compel the defendant to convey to the complainants, or one of them, a house and lot in the city of Newark, as specific performance of agreements entered into by him with each of them. The bill sets forth a parol agreement made by the defendant with Mr. Green, also certain acts in part performance; and also an agreement in writing afterwards entered into by him with Mrs. Green for a conveyance of the same premises on the same terms. It

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prays performance of one or the other. The bill is not multifarious. The uniting these two contracts in one bill may be a misjoinder, and the bill, if it had been demurred to, might have been held bad. But in this case the error is not such that the court will, after the defendant has allowed the cause to proceed to hearing, refuse relief on this technical objection.

By the statute of frauds no suit can be brought on a parol agreement. But courts of equity have long held that it is a fraud to take advantage of the statute after the other party has in part performed the agreement so that he cannot be placed in the same situation. And under this doctrine it is settled that part payment is not, but that taking possession of the premises under the agreement is, such part performance as will take it out of the statute. The complainant says his possession was taken under this agreement, and testifies to this allegation in his bill. The defendant in his responsive answer, under oath, says that it was not under this agreement, but under an agreement to let the premises to Green at \$20 per month, for one year, and that he would at the end of the year convey, if Green did for that time continue sober. He denies in his answer that he ever made the agreement stated in the complainant's bill.

There is no evidence, except that of the complainant, to sustain his allegation. The answer of the defendant is corroborated by his own testimony, and sustained by the testimony of two witnesses, one of whom heard Green state that he was to have the house if he kept sober, but had broken the restrictions by getting drunk at Jersey City. He also told this witness and another that he paid \$20 a month rent. Neither the parol contract stated in the bill, nor an entry under it, is proved. That contract, being denied in the answer, must be shown in such manner as to avoid the effect of the statute of frauds. It is not so proved, and no relief can be had upon it.

The written contract with Mrs. Green is dated May 9th, 1868, one year after the verbal contract with Mr. Green. It was endorsed on a receipt in these words: "Received from

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Mrs. Catharine Green, \$100 on account of payment on house No. 71 Ferry street. Due on account of rent to date, \$120. Thomas E. Richards." Endorsed.—"This is to show that I agree to sell to Mrs. Capt. Green, house and lot No. 71 Ferry street, for the sum of \$2500, and that when there is \$500 paid, and the back rent, I will give her the deed, and take a mortgage for \$2000. T. E. Richards."

This is a contract certain and definite as to the subject matter; the price and the condition precedent, the payment of the back rent. The time is sufficiently certain; it is whenever the back rent shall be paid up and the terms of payment complied with, which makes the defendant liable to perform on demand, within a reasonable time. Performance was demanded within a year, which is not denied to be within a reasonable time. The only material part of this contract that is not definite, is the credit to be given on the mortgage, and whether with interest or not. A mortgage payable at the end of two years, without interest, would be a literal compliance with this contract.

It has been held in this court, when one of the terms of a sale is that part of the consideration is to be secured by mortgage, payable at a time to be fixed and agreed upon by the parties, that the contract is not sufficiently definite to entitle the purchaser to a decree for specific performance. *McKibbin v. Brown*, 1 *McCarter* 13.

It was also held in *Potts v. Whitehead*, 5 *C. E. Green* 55, that when a contract stated that credit was to be given for a certain part of the purchase money, but the length of credit was not fixed, nor whether it was to be with interest, the agreement was not sufficiently fixed. The same doctrine is acted on in *Nichols v. Williams*, 7 *C. E. Green* 63.

But in those cases it was part of the agreement that time was to be given for payment. That time was a material part of the agreement, and it was left undetermined. Here there is no agreement for any time. The purchaser is not entitled to any credit. In such case the mortgage should be made pay-

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able on demand; and it is the duty of a court of equity, in order to prevent a fair and just agreement from being defeated by a mere technical objection, to presume that such was the intention of the parties, and to give the agreement that construction. This makes the written agreement certain in all its parts.

This agreement does not come within the decisions which hold that an agreement to entitle to specific performance must be mutual, and such that the defendant could have had that remedy; these decisions themselves are controverted and conflicting. But they do not apply to a case where the complainant has paid a part or the whole of the consideration, or a consideration for the defendant signing the agreement; or to cases of a lease for years, with the option of purchasing during the term; or to cases where the contract, by its terms, gives to one party a right to the performance which it does not give to the other. *Van Doren v. Robinson*, 1 C. E. Green 259. In such cases specific performance is constantly decreed.

In this case, Richards had received from Mr. Green \$100 on account of the house in Ferry street, in March, 1868, and gave a receipt in those words; and the receipt, on which the agreement is endorsed, is on account of payment on house. \$200 had then been paid on this purchase. The complainants demanded a deed before bringing suit, and tendered \$500 in cash, and a bond and mortgage for \$2000. I think the evidence shows that enough rent had been paid to make the \$500 cover all the money due in cash. It does not appear when the mortgage was made payable. But the defendant did not refuse the offer, or place his refusal on the ground that the mortgage was not according to the agreement. He refused to comply, because he held that he was not bound by the agreement.

Mrs. Green is entitled to relief by a specific performance. It must be referred to a master, to ascertain what amount of back rent is due to Mr. Richards, at the rate of \$20 per month, he paying for repairs and taxes. And upon payment

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of the arrears of rent so found, if any, and \$500, with interest from the date of the master's report on the arrears, and paying \$2000 in cash, or securing it by mortgage on the premises, payable on demand, the defendant will be decreed to convey the premises to Mrs. Green.

FREYTAG vs. HOELAND.

1. An answer, though responsive on the point in controversy, sworn to before an officer in another state, not authorized by the statutes of this state or the rules of this court to take an oath to an answer, has no weight as evidence; it must be treated as a pleading only.

2. When the controversy is as to the fact whether a deed was intended as security only, the burden of proof is on the grantor, and his oath against that of the grantee is not sufficient to change a deed absolute on its face into a mortgage.

3. But where the mortgagee admits that he required an absolute deed as security for a debt, without any recital to show what the debt was, and the mortgagor testifies that the consideration expressed in the deed was the debt it was intended to secure, the burden of proof is on the mortgagee to show that it was given as security for a greater amount.

4. The grantee in such case must re-convey on payment of his debt, and if the net rents and profits exceed the amount the deed was given to secure, and interest, he must repay such excess.

This cause was argued on final hearing upon bill, answer, replication, and proofs.

Mr. Winfield, for complainant.

Mr. A. S. Jackson, for defendant.

THE CHANCELLOR.

The controversy in this case between the parties relates to a deed given by the complainant to the defendant, for a house and lot in Jersey City, dated July 17th, 1869. Both admit that the deed, though absolute on its face, was given as secu-

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rity only, and is, therefore, in effect a mortgage. The complainant contends that it was given as security for the sum of \$700, advanced at the time and mentioned in the deed as the consideration, and for that only. The defendant contends that it was given not only as security for that sum, but also for previous advances to the amount of about \$5300, made by him to Freytag and his family, and for which he was indebted to defendant. Freytag not only denies that the deed was intended to secure these advances, but that they were ever made to him or on his credit. He states that such part as was advanced, was advanced to his wife and daughter for a different consideration, and that he is not and never was liable for it. On both these points, whether the mortgage was given to secure the \$700 only, or all debts due from Freytag, and the amount of these debts, if any, there is a mass of conflicting and contradictory testimony. The circumstances that surround the case are novel and peculiar, and it is not easy to decide which side to believe. The conflict is such as involves perjury somewhere.

Hoeland is, by occupation, a butcher; he followed his trade in Newark, in this state, and afterwards went to California and to Nevada, where he also followed it, and in addition, speculated in lots and mining rights. He was successful in making money to the amount of some thousands of dollars, and advanced at least \$2000 or \$3000 to the wife and daughter of Freytag.

Freytag was a carpenter; he worked at his trade in Newark in 1852 and 1853, when he became acquainted with Hoeland, who boarded in his family for some months of the time. At this time there was a proposition from Mrs. Freytag to Hoeland, or from Hoeland to Mrs. Freytag, to elope together and leave Mr. Freytag and the child. Both testify that there was such a proposition; each testifies that the offer came from the other party, and that it was virtuously rejected by the party testifying. The result was that Hoeland, for a time, ceased boarding there, and he and Mr. Freytag had an encounter, in which Freytag received a wound over his eye,

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the scar of which remains. Mrs. Freytag says the proposition was made through a Mrs. Englehorn. Mrs. Englehorn denies this and supports Hoeland's version of the matter. The weight of testimony, as to this affair, is on Hoeland's side. After this, Hoeland was again received as a boarder by Mrs. Freytag, and was on very friendly and confidential terms with her. When Katinka, the daughter of Mr. and Mrs. Freytag, who was born in 1846, grew up towards womanhood, Hoeland, who was unmarried, took a fancy to her, and expressed a desire to make her his wife when the proper time should arrive. This seemed to be assented to by Mrs. Freytag, and she and Hoeland seemed to act in unison in attempting to accomplish this object. Katinka knew of their purpose and submitted passively to their measures, though it does not appear that she ever positively assented to it, or was willing to bind herself by an engagement to Hoeland. Freytag knew of this design and acquiesced passively, as he seemed to do in everything done by his wife; he was of an easy disposition and much under her control, and though a good workman and earning good wages, he did not accumulate; he had little capacity for business, but was easily controlled by any one in whom he had confidence or who came in contact with him.

Katinka showed some talent for music and singing, and took lessons to fit her for taking part in concerts and the opera. Money was solicited from Hoeland by her mother and herself to enable her to continue her lessons, and was furnished by him. In 1868, Freytag, his wife, and daughter went to Europe; he returned, but Mrs. Freytag and Katinka remained and went to Italy and stayed at Milan for Katinka's musical education. There Hoeland sent money to them at the earnest and repeated requests of the daughter, who, in one of her letters, almost promised to come back to him in San Francisco. He assures her that he could support her and her dear mother. The whole tone of the correspondence shows that on both sides it is conducted without regard to Freytag,

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and independent of him, and that Hoeland's object was to separate his wife and daughter from him.

It would not be strange if a young woman of promise, however humble her origin, who had taken lessons of masters of music, especially in Italy, where the art has reached its highest cultivation, should show some reluctance to fulfill an engagement made for her in childhood, and marry a practical butcher far older than herself, and live with him in Nevada or California. Some indications of this feeling, or perhaps a conclusion that mother and daughter had been using his attachment and hopes to obtain his money without any regard to fulfilling his expectation, seems to have aroused Hoeland to his situation, and to have changed his course regarding them.

The advances made by him had commenced in 1863, and been continued until 1869. All or nearly all claimed by him to have been made, were made to Katinka or Mrs. Freytag, all in the name of Mrs. Freytag, which Katinka signed and endorsed as her own. For none of them was any note, memorandum, or other security taken. Hoeland had no proof of any advance in his possession. He has procured from bankers the drafts by which remittances were made; for some he has letters of Mrs. Freytag or Katinka, acknowledging the receipt; while for the largest single advance, being \$1200, his only proof is his own testimony, that he handed it to Mrs. Freytag, which she denies on oath.

In this situation of affairs in the summer of 1869, Hoeland came to Jersey City; Freytag was there; Mrs. Freytag and Katinka were in Europe. Mr. Freytag owed one Mr. Diffany \$700 on a note that was due. Diffany was pressing for his money; his attorney, Mr. Brown, wrote to Freytag, requiring payment. Freytag applied to Hoeland to lend it on his note, and afterwards on a second mortgage on his house; both these requests Hoeland successively refused. Freytag had a house and lot in Jersey City, bought in 1863, subject to a mortgage for \$8000, worth at least \$16,000. It was on this that he offered to give a second mortgage. Hoeland

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would not advance the money unless he would give him an absolute deed for that house as security. Freytag gave an absolute deed and Hoeland advanced the \$700. The deed was drawn, executed, and acknowledged in the office of Mr. Brown, the attorney of Mr. Diffany, and the \$700 was paid to him in discharge of the note.

So far both agree: but Freytag contends that the deed was given as security for the \$700 then advanced, and for that only; while Hoeland contends that it was for the \$700 and the amounts which he had before advanced. Either bargain was just and fair. If Freytag considered the advances to his wife and daughter as made on his account, and was willing to secure them, it was just that he should include them in this deed. If he was not willing, or was not asked to secure them, and the deed was given as security only for the \$700 then advanced, it is right that it should stand for that only. Hoeland retains the same right that he before had to claim and recover these advances from Freytag in a suit at law. The question now to be determined is, whether this deed, by the agreement of the parties, was given to secure \$700 only. Freytag testifies that it was expressly given for that amount only. Hoeland, on the other hand, testifies that it was given to secure the other advances as well as the \$700. Hoeland's answer does not aid him, for even if responsive on this point, it was not sworn to before any officer authorized by the statutes of this state or the rules of this court to take the oath to an answer; it was sworn to before a justice of the peace in Nevada. It can have no weight as evidence, and must be treated as a pleading only. If the contest was about the fact whether the deed was intended as security, the burden of proof would be upon Freytag, and his oath against that of Hoeland could not be sufficient to change a deed absolute on its face into a mortgage. But Hoeland, by the allegations of his answer and in his testimony, admits that the deed was given as security. And when a mortgagee admits that he required an absolute deed as security for a debt, without any recital to show what the debt was, it would seem right, if the

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burden of proof is thrown on either party, that he should assume it. To require an absolute deed under such circumstances is oppressive, if not unfair, and the hardship, if any, should be upon him who exacts it.

But if the testimony of each party should be given the same weight, there are facts and circumstances attending the transaction which seem to confirm the account given by Freytag, and to show that this deed was intended as security only for the \$700 then advanced.

In the first place, Hoeland says in his testimony, after stating the understanding or agreement which he alleges was made between him and Freytag, that "Mr. Freytag explained it to Brown, and told Brown that he should make out the deed—that it was all right." Mr. Brown was the attorney who had the deed drawn; he would hardly have inserted \$700 as the consideration, if he had been told that it was to secure a much larger sum, and Mr. Brown testifies that although the parties talked together, before him, about other money claims, he knew of no other, and had nothing to do with any other than the \$700. If Freytag, as Hoeland testifies, told him the whole arrangement between them, an intelligent counselor-at-law would have noticed it, and could not have forgotten it. Brown knew it was a deed given as security, and both Hoeland and Wood, Brown's clerk, who drew the deed, say that Brown cautioned Freytag against giving an absolute deed to Hoeland, unless he had perfect confidence in him. W. H. Wood, then clerk in the office of Brown, now a practicing attorney-at-law, drew the deed by Brown's direction, and was present at the execution and acknowledgment; he heard nothing about it being given as security for anything but the \$700, and says that Freytag, at the time of the execution, repeated, "I give mortgage for \$700," which, being almost part of the *res gestæ*, shows what Freytag understood at the time.

Again, the fact that \$700 was inserted in the deed as the consideration is entitled to weight, both as some proof of what the consideration really was, and as yet stronger proof

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of what Freytag considered it to be. It seems to me very improbable that this deed could have been given under the circumstances here existing, without Mr. Brown or Mr. Wood having any knowledge that it was security for any sum beyond the \$700 then paid down. It is easy to conceive that Hoeland supposed that, having an absolute deed, and thus the control of the whole property, he could exact the payment of the amounts advanced to Mrs. Freytag and the daughter before he would re-convey, and concluded, as Freytag agreed to give him an absolute deed, it was by agreement, as well as in effect, a security for the whole; and the transition in testimony, from the effect to the fact of agreement, is often easily made, as experience teaches us. But it is not necessary to explain how Hoeland may be under the impression that Freytag agreed to such security. If the evidence leads to the conclusion that no sum was agreed to be secured, except the sum then advanced, this deed can only be security for that amount.

Hoeland took possession of the premises soon after the deed to him, and has received the rents and profits. An account must be taken of the rents and profits received by him. And Hoeland must be decreed to re-convey the property to Freytag, upon receiving the excess of the \$700, with interest from July 17th, 1869, above the net rents and profits; or, if the net rents and profits exceed the \$700 and interest, he must re-convey, and also pay such excess to Freytag.

MCDAVIT vs. PIERREPOINT.

1. Where a party seeking specific performance of an agreement for the conveyance of lands, claims an allowance for the value of a certain tract to which he alleges the defendant has no title, he must show a title out of the defendant.

2. Where such complainant was in possession of the tract under the defendant, at the date of the agreement, as against him the title must be taken to be in the defendant, until the contrary appears by positive proof.

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3. A claim for deduction on account of the want of possession of a part of the premises, refused, because the words in the agreement for conveyance, describing that tract as "a small piece near the said road in the tenure of Mrs. Whiteford," was a declaration that the defendant's estate was that of landlord or reversioner, and the fair construction and operation of the contract is to convey, subject to the estate which she might have in the premises.

4. The complainant's knowledge that Mrs. W. had occupied the lot for many years, at the date of the agreement, was sufficient notice to put him upon inquiry, and he must be charged with the notice he would have had if he had made inquiry.

5. Though a verbal understanding cannot alter a written agreement, yet if the agreement without it did not warrant the construction given to it, a court of equity would not compel specific performance of it in a manner contrary to the understanding between the parties at the time.

6. Specific performance will not be decreed, when it is against equity under the circumstances of the case.

7. The gross neglect on part of the complainant in the payment of interest and principal pursuant to the contract, and his laches in not tendering payment and bringing suit for nineteen years after he should have paid the whole consideration, and then not until an ejectment was commenced against him, would deprive him of the right to performance, if the defendant was not willing to perform.

Argued on final hearing upon bill, answer, replication, and proofs.

Mr. Kays, for complainant.

Mr. Linn, for defendant.

THE CHANCELLOR.

The complainant asks for the specific performance of an agreement to convey lands in the county of Sussex, entered into in writing between him and the defendant, in March, 1843. The agreement is admitted by the defendant, and he does not refuse to perform it by conveying the property; but the complainant claims an allowance for the value of seventeen acres of the tract, to which he alleges that the defendant had no title, and for the value of the loss of the occupation of a part of the tract known as the Whiteford lot, which was

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in the possession of Mrs. Whiteford at the time of the contract, under a valid lease for her life, and who occupied it until her death, which occurred in 1863, about four years before the filing of the bill.

The written contract was to convey two tracts, one of one hundred and eighty-two acres, and another tract adjoining it of seventeen acres, and described them as "the two tracts making the farm known as the McDavit farm, and now in the tenure of the said Thomas McDavit, and a small piece near the said road in the tenure of Mrs. Whiteford." The complainant had lived on this farm with his mother and as tenant, since 1821; both occupied as tenants under John Rutherford, from whom Mrs. Whiteford held by lease for life. She had occupied this small parcel for the whole time. The complainant agreed to pay for these tracts the sum of \$2500 on or before the 1st day of April, 1848, with interest annually on the 1st day of April, in each year. It was also agreed between the parties to the agreement, that McDavit should enter into possession of the premises, and hold the same until he should make default in the performance of the covenants therein contained on his part.

On the 1st of April, 1844, McDavit paid \$150, the interest then due, and \$500 on the principal. After this he never paid the interest as stipulated. On the 1st of April, 1848, the interest was in arrear \$250, and the remaining \$2000 of the price was due, and should have been paid. He made irregular payments of interest, but never in full until March 28th, 1855, when he made a payment of \$600, which exceeded the interest then in arrear by \$250; he never after this made any payment. Pierrepont commenced an ejectment to obtain possession in 1867, and this suit was brought to restrain the defendant, and compel specific performance.

As to the seventeen-acre lot, no title is shown out of the defendant. McDavit was in possession of it under him at the date of the agreement, and as against McDavit the title must be taken to be in Pierrepont, until the contrary appears by positive proof. No proof is offered, except a deed from

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Morris and Linn to McDavit, in 1836; but it is not shown that they ever had any title or possession. McDavit, under Pierrepont, was in adverse possession. There is no ground for deduction on account of the seventeen-acre lot.

As Mrs. Whiteford is now dead, there can be no claim for deduction on account of want of title to that lot; the only claim made is for a deduction on account of the want of possession. She lived and held possession eighteen years after the contract.

I think that under the circumstances the complainant must be charged with knowledge of the lease to Mrs. Whiteford for life, independent of the testimony of Mr. Rutherford. He knew she had been occupying the lot for more than twenty years—that it was and had been for all that time her home. He had notice enough by this to put him upon inquiry, and must be charged with the notice he would have had if he made inquiry. But the testimony of Mr. Rutherford puts this matter beyond doubt. It shows that the complainant knew of the lease to Mrs. Whiteford, and agreed verbally to take the deed, subject to her lease, and that a reduction was made in the price on account of this lease. The agreement states the premises to be in the tenure of Mrs. Whiteford. This is a declaration that she held of the defendant by some title, that the defendant's estate was that of landlord or reversioner, and that the fair construction and operation of this contract is to convey, subject to the tenure or estate which she might have in the premises. The agreement that he should have possession must be construed in reference to this—that the possession was to be such as a landlord or reversioner could give of leased premises. He would have been entitled to the rent, if any, and to the control that a landlord has to prevent waste, and for other purposes. By the fair construction of this agreement, this is all the possession to which McDavit was entitled of the Whiteford lot. The verbal understanding cannot alter the agreement; but if the agreement, without it, did not warrant the construction given to it, a court of equity would not compel specific performance of it in a manner con-

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trary to the understanding between the parties at the time. Specific performance will not be decreed where it is against equity under the circumstances of the case. It is a matter above all others that requires fair dealing by the complainant. The construction above given to this agreement was that given to it by both parties at the time. McDavit testifies that it was his understanding of it, until he consulted counsel, shortly before the commencement of the litigation in this matter. It would not be equitable to decree specific performance with a deduction for the want of possession of the McDavit lot.

The gross neglect on part of the complainant in payment of interest and principal, and his laches in not tendering payment and bringing suit for nineteen years after he should have paid the whole consideration, and then not until an ejectment was commenced, has been such as would deprive him of the right to this relief, if the defendant was not willing to perform. He has submitted himself to the judgment of the court in this matter, or a decree would not be made; and, if made, it must be made on equitable terms only.

There must be a reference to ascertain the amount due on the contract, and a decree for conveyance, upon payment of that amount, and the costs of the defendant.

DORSHEIMER vs. RORBACK and others.

1. No relief can be had, even in equity, by the next of kin, against the sureties on an administrator's bond.

2. Such sureties are, however, proper, though not necessary parties in a suit in equity against the administrators for a distributive share.

3. A general demurrer will not lie, where the demurrant is a proper party, though no relief can be had against him.

4. When a party who cannot read is sought to be bound by a writing under seal, it must appear that he had it read to him or knew its contents. Where such a paper, for want of such due execution, is invalid and void, it will not protect administrators who have paid moneys, relying on it, that they paid the moneys in good faith.

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5. The next of kin may maintain a suit in equity for his distributive share, and although the courts of law and the Orphans Court have jurisdiction in such case when there has been a decree of distribution, yet the suit will be maintained by this court; and when there has been no decree of distribution, the remedy must be in equity.

6. Ordinarily, a legatee or next of kin must sue the executor or administrator only for the legacy or distributive share; he cannot join with him the debtors to the estate, or other persons. But where there is collusion between the executor and the debtor or person having the property in his hands, or where the executor is insolvent, the debtor may be made a party, and recovery be had against him.

The argument of the cause came on upon a general demurrer of the defendants, the executors of Nathan Drake, and upon the answer of the other defendants, the replication of the complainant, and the proofs of both parties.

Mr. Pitney and *Mr. Coult*, for complainant.

Mr. McCarter, for defendants.

THE CHANCELLOR.

The complainant is one of the next of kin of John Rorback, deceased, late of Newton, in the county of Sussex. He died on the 15th of February, 1855, intestate, never having been married, leaving as next of kin four brothers and sisters, and the complainant and her sister, Martha Scott, the only children of a deceased sister, each of whom was thus entitled to one-tenth of the residue of his personal estate. His personal estate amounted to more than \$75,000, and the residue of it, on a settlement of the account of the administrators in the Orphans Court of Sussex county, on the 2d of December, 1856, was \$67,018. The complainant was entitled to one-tenth of this, or \$6701.80. This is not disputed by the defendants.

Administration of the estate of the intestate was granted March 26th, 1855, by the surrogate of Sussex, to Samuel Rorback and John H. Neldon. Their sureties were Charles P. Rorback, Nathan Drake, and John Rorback. After set-

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tlement of the account, both the administrators and Nathan Drake died. The bill was filed against John Rorback and Charles P. Rorback, and against Charles P. Rorback as surviving executor of Samuel Rorback; Susan M. Neldon, administratrix of John H. Neldon; and the executors of Nathan Drake. Susan M. Neldon died after answer, and the suit was revived by bill against the administrator *de bonis non* of John Neldon.

The demurrer is upon the ground that in a suit in equity against administrators for an account, or for a distributive share, no relief can be had against the sureties; that their contract is with the Ordinary, and that they are amenable to him only. I am of opinion that no relief can be had even in equity, by the next of kin, against the sureties on the bond. There is no precedent for it in this state or in England. Vice Chancellor McCoun, in *Currow v. Mowatt*, 2 *Edw. Ch.* 57, upon the authority of decisions in Virginia, cited by him, held that the sureties and representatives of an administrator could be declared liable in the same suit. But this decision is so contrary to the principles on which a recovery is held and the proceeds administered upon administrators' bonds, that I do not feel constrained to follow it. But while I am of opinion that no decree for relief can be had against the sureties in this suit, I am also of opinion that the sureties are proper, though not necessary parties. They are interested in the result; they may be called upon by suit at law for the amount which may be recovered in this suit against the representative of their principal. They will be bound by the decree made in this suit as to the amount due to the complainant, and it is proper that they should have a right to defend, so as to prevent any collusion between the complainant and the principal, and to protect themselves from any neglect of the principal to make proper defence. The demurrer, therefore, being general, must be overruled, as these defendants are proper parties, although no decree for the payment of the share by them can be made in it. The only decree that will affect them must be against those who represent the

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principals. Against this they would have been protected, if they had answered, and will be, if the bill is taken as confessed as against them.

The bill charges that the complainant is, and has always been, an idiot, not having sufficient capacity or understanding to transact any business; and she exhibits her bill by her guardian. The bill states that the administrators of John Rorback, deceased, paid her distributive share to the defendant, John Rorback, her assignee, and have recorded his receipt and release as such assignee in the surrogate's office. The bill denies that she ever executed, or was capable of executing, any assignment, and that if she did execute any such, it was obtained by fraud, without consideration, and without her understanding the contents or purport. The bill prays that the defendants may be decreed to pay her distributive share, with interest, and for such other relief as may seem proper. The defendants, John Rorback and Charles P. Rorback, for himself and as executor of Samuel Rorback, and the administrator of John H. Neldon, have answered. They deny the idiocy of the complainant. They set up that the distributive share of the complainant was, on the 27th day of April, 1857, paid by the administrators of John Rorback, deceased, to John Rorback, by virtue of an assignment made to him of the complainant's share by her sister, Martha Scott, who acted as her guardian. That they relied upon said assignment and the receipt of the assignee. They also state that the complainant executed a receipt to them under her seal, dated July 23d, 1856, but do not state that this was presented, or was ever delivered to the administrator, or that the share was paid on faith of that receipt. They insist that the share was paid to the assignee in good faith, in the belief that the sister was authorized to make the assignment, and that the circumstances warranted such belief.

The evidence shows that the complainant, who is fifty-eight years old, is, and has been, from childhood, if not from her birth, an idiot, without capacity to make any contract or bargain, or to make any assignment of a share like this, or to

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give a receipt or release for it. The evidence, with the exception of that of John Rorback, is all clear and decided upon that point. A large number of witnesses, who have been her neighbors for years, and have known her and her family well, have been examined, and I have no doubt of the truthfulness of their testimony. It is so clear and decided that I need not examine it here.

But the idiocy is of little consequence in the case. The assignment upon which the share was paid was not executed by her, but her sister as her guardian. The complainant was then over forty years old. Her sister could not have been guardian of her as an infant, or by any testamentary appointment. It appears by the will of her father, offered in evidence, dated May 1st, 1854, that he devised to her a farm in Canada where he resided, and directed that, as Mary, from her mental imbecility, was unfit to take charge of the farm, her sister Martha should act as her guardian, and take the management thereof. But this guardianship did not extend beyond the management of the farm. It made Martha not guardian of her person, but only trustee of the property devised to her in the will. It is clear, and it is not disproved, that Martha had no power to assign Mary's share.

The receipt was signed by making a mark ; and the subscribing witness who made the mark for her, does not recollect or testify that the receipt was read to her, or that she was in any way informed of its contents. There is no proof that it was read to her, or that she had any knowledge or intimation of its contents. One of the cardinal requisites of any writing under seal is, that the person executing it should have it read to him, or know its contents. If the grantor can read, he will be presumed to have read it ; but if he cannot, it must be shown that it was read, or its contents made known. The addition of the words, "if he require it," in the second resolution in *Throughgood's case*, 2 Rep. 9, where this rule is laid down, does not apply to a case like this, where the party had no idea or notion of what the paper executed was, or for what purpose she touched the pen with which the

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mark was made, and because she did nothing that could amount to a delivery.

The assignment and receipt both being invalid and void, the defendants contended on the argument, that the moneys were paid by the administrators in good faith, and they must therefore be protected.

I know of no rule at law or in equity that would protect persons making a payment under such circumstances, because it was made in good faith. If made honestly and without collusion with John Rorback, the assignee, it was made with great negligence and carelessness. John Rorback was the son of the administrator, Samuel. Both must be presumed to have known or heard, in some manner, of the infirmity of one so nearly related to them. John claimed shares known to his father and himself to be worth about \$14,000, and at the time of payment settled and realized beyond question, for a consideration of \$8000, a little more than half the cash value. The mere recital that Martha was guardian was not sufficient. They should have inquired for the documentary proof of such guardianship; and if the will had been produced it would have appeared that it did not pretend to extend to this money, but was a mere trust, limited to the Canada farm. They should have known that a sale or a settlement by a guardian or trustee at such a sacrifice of a settled valid claim, is never allowed or sustained.

Again: a bond, in which Samuel Rorback was surety, was given by John in August, 1855, to Martha Scott and her husband, for the price of these two shares, in the condition of which it was provided that Scott and his wife should, by mortgages, indemnify John Rorback from any claim to be made by the complainant for her share, which her sister had assigned as her guardian. This shows that Samuel knew that the power of Martha, as guardian, to assign was doubted so seriously, that his son, who was to pay for both little more than the cash value of one share, would not rely on it without abundant indemnity. Again: Martha Scott testifies that some time before the payment by the administrators, she

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stayed at the house of her uncle Samuel, and talked with him about Mary's condition of mind. Indeed, it is hardly possible to believe that Samuel Rorback did not know of Mary's condition. He knew enough to require the utmost vigilance in seeing to the authority of Martha, and seeing that any paper signed by the complainant with her mark, had been read and explained to her. He made no question as to either, but paid over the money without inquiry. This was not only carelessness and negligence, but in an administrator who is a trustee for the next of kin, it is gross and almost criminal negligence. He pays over to his own son on papers which show their illegality on their face, the share of an idiot or imbecile, together with that of her ignorant sister, on a purchase for little more than half the value; an inadequacy of consideration so gross as almost of itself to amount to fraud, and such as would arouse the suspicion of any honest man. A trustee who stands by and allows his *cestui que trust* to be plundered, cannot be protected by the plea of good faith.

As to the receipt, dated a year before the payment, there is no evidence that the administrators ever knew of its existence. If they did, they knew that it was false, that the fact of the payment recited to have been made by them nine months before, was untrue, and that the amount never had been and never would be paid to her, but that the assignee claimed it for himself by the assignment.

The claim against the administrators of John Rorback, deceased, and their representatives, is sustained; they must be decreed to pay the whole amount of the distributive share, with interest.

The next of kin may maintain a suit in equity for his distributive share, and although the courts of law and the Orphans Court have jurisdiction in such case when there has been a decree of distribution, yet the suit will be maintained by this court; and when there has been no decree of distribution, as in this case, the remedy must be in equity. *Frey v. Demarest*, 1 C. E. Green 236.

It is claimed on part of the complainant that she is entitled

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also to a decree against John Rorback for her distributive share, on the ground that he received it from the administrators on a void assignment and power of attorney, and now actually has the share in his possession; and that it is the duty of the court in this suit in which all parties concerned are before the court, to direct payment to be made by him, both because he is equitably bound to repay it, and because it might render unnecessary any suit by the representatives of the original administrators to receive it from him. Ordinarily, a legatee or next of kin must sue the executor or administrator only for the legacy or distributive share; he cannot join with him the debtors to the estate or other persons. But in cases where there is collusion between the executor and the debtor, or person having the property in his hands, or in cases where the executor is insolvent, the debtor may be made a party and recovery had against him. *Story's Eq. Pl.*, §§ 178, 514; *Holland v. Prior*, 1 *Myl. & K.* 237; *Long v. Majestre*, 1 *Johns. Ch.* 305; *Alsager v. Rowley*, 6 *Ves.* 748.

In this case collusion or insolvency is not alleged in the bill. This might have created difficulty if the question had been raised on demurrer. I think, for the reasons above stated, that the payment to John Rorback was not in good faith, but with negligence so gross as to amount to collusion, and that, although there is no evidence of the insolvency of the administrators or their present representative, yet that the death of both these administrators, and the difficulty of following the estate into the hands of the representatives of either, and of having a recovery by showing assets in their hands, brings the case within the reason of the rules, and makes John Rorback a proper party. And the fact that, by an invalid assignment which he presented as a legal one, he actually received the distributive share of the complainant, and still has it, brings him clearly within the reason of the rule. The evidence shows that he received the whole of the complainant's share; indeed he admits it, but insists that part of it was paid to Martha Scott and her husband, for the com-

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plainant. I think the evidence shows that only \$6700 in all was paid to James and Martha Scott. Martha Scott testifies that only \$1000 was paid at the time of the assignment. John Rorback says: "After the papers were made out, I paid them then, *I think*, \$2500, which they said they wanted to put in a house." Afterwards he says: "I paid \$2500; I did not take any receipt to show the payment; the whole business was done in David Thompson's office; I think the money was delivered to Mrs. Scott or to Mr. Thompson for them; it was done in the office; *I think* it was paid in cash." David Thompson testifies that he does not recollect of seeing any money pass that day, August 17th, 1855. Now, one of the papers drawn on that day was the assignment; another was John Rorback's bond to the Scotts to pay them \$7000 on their giving him an indemnity against any claim by the complainant; both these papers are dated on that day. One surety on the bond is John Rorback's counsel, who, they all say, was present at Thompson's office at the settlement. All agree that the price to be paid for the assignment was \$8000. Now, the giving a bond at this time for \$7000 seems to me conclusive proof that only \$1000 was paid. When \$500 was paid a short time afterwards, it was endorsed on the bond. No business man would, with two lawyers present to direct, have given a bond for \$7000 to secure the balance due of \$8000, if \$2500 of it had been paid. The \$6700 thus paid to Martha Scott was less than her distributive share; the amount received by him for her was \$6978.78. He retained more than that amount of what was paid him by the administrators. This they paid to him as the complainant's share, supposing that he had the right or power to receive it. True, he did not receive it for her, but for himself. Had he received it for her, she could have recovered it at law as so much money received for her use. But he obtained it by a fraud upon the administrators; and in a court of equity, which has cognizance of frauds, and whose duty it is to remedy them, he may be held liable to the complainant for this money belonging to her which he thus fraudulently obtained

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from the administrators. A decree compelling him to pay it to the complainant will be equity as against him, and will do justice to the representatives of the administrators. Their negligence in paying to him without inquiry into his right, under circumstances of suspicion, cannot avail him to prevent the recovery of the money thus obtained by his positive fraud.

It is objected on part of the defendants that no decree can be had against him because it is not included in the relief prayed for in the bill, nor is such recovery warranted by the facts stated in the bill. The bill contains the general prayer for relief; but the special prayer is that the defendants may be decreed to pay her the full amount of her distributive share, with interest. He is one of the defendants. The prayer, then, is sufficient.

The facts stated in the bill are sufficient to entitle the complainant to the relief. The position of the counsel for the defendants, that no relief can be had except upon the *allegata et probata*, is sound. The facts on which the relief is founded must not only be proved, but must be sufficiently stated in the bill to warrant the relief.

The bill sets out *verbatim* the receipt of John Rorback, dated April 25th, 1857, in which he acknowledges that he received of the administrators \$13,957.56, as the distributive share of Martha and Mary. The half of this, or \$6978.78, belonged to the complainant, and this receipt admits that it was received as her distributive share. This receipt, though not a formal allegation of the fact that he thus received this distributive share, is a sufficient and clear statement of the fact that he received it, and that he received it under the pretence that he was her assignee. The bill states that she never made any assignment, and that if her signature was affixed to any such assignment it was obtained by fraud and imposition. These, with the allegations already noticed of her being entitled to the share, are sufficient to ground a decree for relief against John Rorback.

There must be a decree in favor of the complainant for \$6978.78, with interest from December 2d, 1866. If there

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is any legal claim to refund out of this the amount claimed to have been refunded by John Rorback, it may be shown before the master, and deducted by him from the amount.

The decree must be against John Rorback, and the administrator of John H. Neldon, and the executor of Samuel Rorback. And the amount must be made out of the defendant, John Rorback, if sufficient property of his can be found for the purpose; and if not, out of the representatives of John H. Neldon and of Samuel Rorback.

MARLATT vs. SMITH and WARWICK.

Exceptions to a charge in an account stated by a master, which was founded on a statement presented to the master under the oath of the exceptants, may be allowed, if it appear clearly that such statement, in the sworn statement, was by mistake. But such evidence must be of the clearest and most satisfactory kind. The master was right in making the charge upon such sworn statement, without any other proof by the other party.

Argued on exceptions to the master's report.

Mr. E. T. Green, for exceptants.

Mr. J. Wilson, for complainant.

THE CHANCELLOR.

All the exceptions that were insisted on by the counsel for the exceptants, except so much of the fourth exception as relates to corn sold to B. Reed and sons, were overruled at the argument. This was reserved for further consideration, upon being furnished with a copy of all the testimony relating thereto.

I have examined that testimony, and find that the master made the charge from an account furnished by the exceptants, of all the cash received by Smith and Warwick from the Marlatt

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farms. This account charges them with cash received from B. Reed and sons, for corn, two hundred and forty-five seventieths bushels—\$160.50. The exceptants testified that this account was carefully made out by the exceptant, Smith, in presence of, and with the approval of Warwick. The master, upon this evidence, ought to have made the charge, if there was nothing to contradict it. Such evidence, although the account was corroborated by the oath of both, including Warwick, who had personal knowledge of the transaction, may still be shown to be a mistake, and be corrected. But it should only be overcome by the clearest and most convincing proof.

It should not be disallowed, unless the exceptants had declared before the master that this item in the account was a mistake, and had, by the testimony of one of them, shown that it was a mistake, and in what the mistake consisted. The complainant had good right to rely on the admission in that account, and to omit producing other evidence before the master to sustain it.

The evidence referred to by the counsel for the defendants throws some doubt over the correctness of that charge, but not sufficient to overcome the admission by the defendants, confirmed by their oaths. The master was right, as the case stood before him, in allowing this charge. It was possible that some corn from the Marlatt farms, other than that sold by the sheriff to Warwick, might have been furnished to B. Reed and sons. Some of the crop of 1863 might have been sold before Smith and Warwick's replevy. In *Exhibit No. 1* the charge is made in the year 1863. The sheriff's sale was in March, 1864, and if the sale to Reed was in 1863, it could not have been the corn sold by the sheriff.

This exception must also be overruled.

Dellett v. Kemble.

DELLETT *vs.* KEMBLE and others.

1. Where a party purchases land at its full, fair value, and, supposing it to be free from encumbrance, erects buildings of considerable value, and judgment creditors of the former owner of the land, with knowledge that these buildings were being erected, and having reason to believe that it was done under a mistake, by their silence and acquiescence fraudulently encourage him to go on and erect his buildings, and then issue an execution, the sale of the buildings will be restrained.

2. If enough of the buildings had been erected, without the knowledge of the defendants, to satisfy their judgment, by adding to their value the price of the lot, the defendant should be allowed to sell. This does not sufficiently appear by the answer; and therefore injunction continued to the hearing.

On motion to dissolve injunction.

Mr. Merritt, for motion.

Mr. F. Voorhees, contra.

THE CHANCELLOR.

The complainant purchased a lot for \$50, being about its full, fair value, and, supposing it to be free from encumbrance, he put on it buildings of the value of \$2500. The defendants, Allen and McLaren, had a judgment for about \$600, obtained in the Supreme Court against John Scott, from whom the complainant derived title, and which was a lien on the lot, and they assigned one-half of this judgment to the defendant, Messmore. The complainant had been told that there was no encumbrance on his lot, and made no search in the Supreme Court clerk's office. Allen, McLaren, and Messmore knew of the buildings being erected some time during the progress of erection, but did not interfere or advise the complainant of their lien until the buildings were completed, when they issued an execution and directed a sale. The complainant offers to pay to them \$50, or the value of

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the lot, whatever it may be, but asks to restrain the sale of the buildings, on the ground that he erected them on that lot by a mistake, believing the title to be unencumbered, and that the defendants, knowing of this mistake, by their silence and acquiescence fraudulently encouraged him to go on and erect his buildings on this lot, for the purpose of seizing them on their execution.

It is unjust that the defendants should in this way be enabled to appropriate the property of the complainant, on whom they had no claim, to pay the debt of a stranger. But if it is by the culpable negligence of the complainant, he will be without remedy, even in equity, unless the conduct or the silence of the defendants induced him to do it, when such conduct or silence was fraudulently designed for that purpose.

The complainant has no title for relief on the ground of mistake. If one erects a building by mistake on the land of another, who knows nothing of it, and, of course, cannot acquiesce, he has no relief on the ground of his own mistake only.

To make acquiescence or silence a fraud, the party charged must know or have reason to believe that the act is done under a mistake; knowledge of its being done is not sufficient. A mortgagee may see a building erected on the lands mortgaged to him; it is not his duty to give notice of his mortgage, if recorded. The mortgagor has a right to improve, and the improvement ordinarily will enure to his benefit. But either positive notice that he is under a mistake, or improvements put on in such manner that must convince any reasonable man that there must be a mistake, may make acquiescence or silence a fraud. I think the facts in this case are sufficient to require notice of their claim from these defendants, if they knew of the building being erected. The defendants could not but infer that there was some mistake.

But it is not clear at what time in the progress of the buildings the defendants knew of their erection. Some of them had such knowledge before their completion. The answer is not explicit on that point. If enough of the build-

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ings had been erected without their knowledge to satisfy the judgment, by adding to their value the price of the lot, the defendants should be allowed to sell. The real merits of the case cannot be ascertained until the hearing. It is a proper case for the exercise of the discretion of the court to retain the injunction until the hearing.

The motion is denied. The costs must abide the event of the suit.

 OWNES vs. OWNES and others.

1. A declaration of trust, though not executed at the same time and place with the deed whose purposes it declares, being dated on the same day, and being the consideration of the deed, must be considered as part of the same transaction, and they must be construed together.

2. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se*, or *malum prohibitum*. It would not create a trust in such case.

3. But where the trust is declared by a writing executed and delivered, and the estate is vested in the complainant, and the object of the suit is to compel a naked trustee to convey the property held in trust to the cestui que trust, it will not bar the relief sought, that the conveyance to the trustee was made for the purpose of delaying and defrauding the complainant's creditors.

4. If, instead of a declaration of trust, the instrument executed had been a mere contract to re-convey the property; or if the bill had been filed to establish a trust, either as a resulting trust or on a parol agreement; the defence that the conveyance had been made to delay and defraud creditors would bar the relief.

5. Courts of equity have recognized and established this distinction between conveyances and executory contracts: where the title is vested, they never avoid it for want of consideration; and, on the other hand, they never enforce an executory contract without consideration—they treat it as a nullity.

6. A conveyance or declaration of trust by an infant, by a deed actually delivered, is voidable, but not void. But the infant, after coming of age, may by his acts confirm the deed.

Owens v. Owens.

This cause was argued on final hearing, upon pleadings and proofs.

Mr. W. Strong, for complainant.

Mr. A. V. Schenck, for defendants.

THE CHANCELLOR.

The suit is by the complainant, against the widow and heirs of her deceased son, James H. Owens, for the conveyance of certain lands in the city of New Brunswick, held by her son in trust for her, as she alleges. These lands were conveyed by her to her son by deed dated May 21st, 1855, and by a declaration of trust, bearing date on the same day, executed by James H. Owens, under his hand and seal, attested by a subscribing witness, were declared to be held in trust for the complainant, and on the agreement to convey the same to her or any person whom she should appoint. It concluded with these words: "It being clearly understood by me that I merely hold the said property in trust for said purpose, and that I have no property or interest therein, except as such trustee." No valuable consideration was paid to the complainant for the conveyance, except this declaration of trust. This declaration was not executed at the same time and place with the deed, but being dated on the same day, and being the consideration of the deed, the two instruments must be considered as part of the same transaction, and be construed together.

This declaration, if valid, vested the beneficial title to the lands in the complainant as *cestui que trust*, and left the bare legal estate in James as trustee, and upon his dying intestate, the legal estate vested in his heirs or heir-at-law. The suit is against his widow and his three children—two daughters and one son, all infants—for a conveyance of the property to the complainant as the *cestui que trust*.

The defendants contend that the property was conveyed to James Owens for the purpose of delaying and defrauding the

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creditors of the complainant, and that this court will therefore grant no relief.

Assuming that it is sufficiently proved that the conveyance by the complainant to her son was to delay and defraud her creditors, it does not seem to me to be a bar to the relief sought. If the instrument executed by James had been mere contract to re-convey the property, or the bill had been filed to establish a trust, either as a resulting trust, or on parole agreement, the defence would be a bar to the relief. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se*, *malum prohibitum*. It would not create a trust in such case. But here the trust is declared by a writing executed and delivered. The estate is vested in the complainant, and the object of the suit is to compel a naked trustee to convey the property held in trust to the *cestui que trust*—to perform an existing trust.

Courts of equity, in the analogous cases of contracts and conveyances without consideration, have recognized and established this distinction between conveyances and executory contracts: Where the title is vested, they never avoid it for want of consideration. And, on the other hand, they never enforce an executory contract without consideration; they treat it as a nullity. In *Bunn v. Winthrop*, 1 Johns. C. 329, this distinction is clearly laid down by Chancellor Kent. It was also recognized and acted upon by the Court of Appeals in *Wright v. Miller*, 4 Seld. 9.

The maxim, *in pari delicto, potior est conditio possidentis* protects the title actually vested in the complainant. If the legal estate had been re-conveyed to the complainant, the title could not have been affected by the fraud of the transaction from which the conveyance arose. And the rule must be the same when the equitable estate has been actually vested by proper conveyance. I know of no case in which a court of equity have refused to enforce a trust actually declared and vested, on account of fraud in the conveyance to the trustee who declared the trust.

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But James, at the time of this conveyance and declaration of trust, was an infant, only nineteen years of age. The conveyance or declaration of trust by an infant, by a deed actually delivered, is voidable, but not void. This was so held by Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. 1794. He held a deed of bargain and sale delivered by the infant voidable, and not void. The doctrine of Lord Mansfield has been doubted by many jurists, and there have been decisions contrary to it; but the modern cases confirm his opinion, and it may now be considered as the settled law. *Bool v. Mix*, 17 Wend. 119; *Eagle Fire Company v. Lent*, 6 Paige 635; *Tucker v. Moreland*, 10 Pet. 71; *Gillett v. Stanley*, 1 Hill (N. Y.) 121; 2 *Kent's Com.* 234; *Tyler on Infancy* 42, 51.

An infant, after coming of age, may, by his acts, confirm a voidable deed. Many acts of James, after his majority, recognizing the fact that he held this property in trust for his mother, are shown. He took her directions about fencing and repairing it. He collected the rents, and paid them to her. He mortgaged the property for her benefit, and acknowledged, repeatedly, that he held it in trust for her. - I think the evidence is amply sufficient to show that he confirmed this deed by his acts for years after he came of age. If the deed and declarations of trust are to be treated as one transaction, collecting rent, or executing a mortgage, or any act treating the property as his own, would be a confirmation.

The trust being thus established, the complainant is entitled to a decree that the defendants, the widow and children of James, convey to her the legal estate. She is also entitled to an account from the defendants, John Runyon and Elizabeth Ownes, the administrators of James H. Ownes, deceased, of the rents received by him in his lifetime, and from them individually of the rents received by either of them since his death; and to a decree that the administrators pay on the mortgage given to Richard Manley the sum of \$300 and the interest in arrear thereon. The complainant, on receiving the conveyance, to pay all moneys paid by James or the defendants for principal or interest on the residue of said mort-

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gage, and to relieve the defendant administrators, and the estate, from all further liability on the bond and mortgage to Richard Manley.

DENTON and wife vs. LEDDELL.

1. No one can have an easement in his own lands; and if an easement exists, if the owner of the dominant or servient tenement acquire the other, the easement is extinguished.

2. But if the owner of a tract of land, of which one part has had the benefit of a drain, water-pipe, or water-course, or other artificial advantage in the nature of an easement through or in the other part, sells or devises either part, an easement is created by implication in or to the other part. And this is the case even if it is the servient part that is sold or devised. But this is confined to continuous and apparent easements.

3. The testator devised to the defendant a tract of land on which were a saw-mill, dam, and mill-pond. He devised to the complainant a farm through which the mill-stream flowed to the defendant's land. By a subsequent clause in the will, he gave to the defendant, as appurtenant to the saw-mill upon the tract devised to him, "the right to the owners of the mill at all times thereafter to raise the water in the pond till the surface of the water should reach a mark * * on a rock, &c." The testator directed that the lands devised to the complainant should "be subject to said right and privilege as aforesaid, and subject to such flowage and damage as might be consequent on such raising of the water." *Held*, that the defendant is restricted to the mark on the rock as the limit to which he can raise the water on the complainant's land. The clause limiting the right of flowage restricts the defendant from raising the water to the height to which it was raised by the dam at the testator's death.

4. The clause restricting the height to which the defendant may raise the water on complainant's land, does not limit the height at which defendant may keep his dam, except that he cannot keep it at any height in such state that it throws back water higher than the limit so fixed.

5. Where a question was one proper to be tried on an issue directed, if such issue had been applied for, but both parties have proceeded to take testimony at great length, and allowed the hearing to be brought on, without applying for an issue, it is the province and duty of this court to decide it, if the evidence is such that the court can arrive at a satisfactory conclusion.

6. When the fact of a nuisance is clear, especially when it is not disputed, a court of equity will interfere without a trial at law.

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Argued upon bill, answer, and proofs.

Mr. Pitney, for complainants.

Mr. Vanatta, for defendant.

THE CHANCELLOR.

The complainant, Mrs. Denton, owns a farm through which a stream runs upon the adjoining lands of the defendant, William Leddell, where it is used to drive a mill. The complaint is that the defendant maintains his dam, and flows back water on the complainant's lands higher than he is entitled to do. The object of the suit is to compel him to lower both the dam and the water, and to fix and settle the height to which the water may be raised.

The complainant and the defendant both derive title to their respective lands from the will of their father, John W. Leddell, who died April 15th, 1865. The will was dated July 1st, 1859; the last codicil, March 18th, 1863. He had, some years before his death, put each of them in possession of the property which he devised to them, respectively. In 1850, by the direction of the testator, a mark had been made by the defendant on a rock in the stream at the upper side of the lands devised to Mrs. Denton, and on the boundary between this and the lands of Elias Vance. This mark was for the purpose of showing the height of the water at its ordinary state. A certificate of making this mark, and describing the rock and the mark, was signed by the defendant and J. B. Mellen and J. P. Sutton, who were present and aided in making the mark; this certificate is dated October 26th, 1850.

The defendant, in the lifetime of his father, had raised the dam on the lands devised to him, so as to raise the water above the mark on the rock and above the rock itself, and had purchased from the owner of the lands along the stream above Mrs. Denton's farm, the right to raise the water on these lands. This raising was done and purchase made with

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the knowledge of his father before the date of the will, and without any remonstrance by his father.

The third clause of the will devised to the defendant, among other tracts of land, the tract on which the mill, the dam, and mill-pond were. The fourth clause devised several tracts to the complainant, including the farm through which the mill-stream flowed to the lands of the defendant.

The ninth clause gave to William, as appurtenant to the saw-mill upon the lands before devised to him, "the right to the owners of the mill at all times thereafter to raise the water in the pond till the surface of the water should reach a mark made by his son William, in the presence of James Mellen and Joseph Sutton as witnesses, on a rock on the lower or east side of the road from Washington corner to the house of Mellen;" stating that this mark had been made on this rock where the surface of the stream struck and ran round said rock from time immemorial, to show what had been the height of said stream at said rock. And he directed that the lands thereinbefore devised to his daughter should "be subject to said right and privilege as aforesaid, and subject to such flowage and damage as might be consequent on such raising of the water."

The first question in the case is upon the effect of these devises. The complainant contends that the defendant is restricted to the mark on the rock as the limit to which he can raise the water on her land. The defendant claims the right to raise it to the height to which it was raised by the dam at the death of the testator, when the will took effect.

The devise of the mill lot in the third clause, standing alone, would convey, as part of the mill lot, the right to keep the water on Mrs. Denton's lot at the height at which it stood at the death of the testator, that being the time when the devise took effect. No one can have an easement in his own lands; and if an easement exists, if the owner of the dominant or servient tenement acquire the other, the easement is extinguished. For an easement is a right in the lands of another.

But if the owner of a tract of land of which one part has had the benefit of a drain, water-pipe, or water-course, or other artificial advantage in the nature of an easement through or in the other part, sells or devises either part, an easement is created by implication in or to the other part. And this is the case even if it is the servient part that is sold or devised. But this is confined to continuous and apparent easements. This doctrine was established in England in the reign of James I., in the case of *Nicholas v. Chamberlain*, Cro. Jac. 150, and is well established by subsequent decisions in England and in this state. These views are considered and assented to in the opinion in this court in *Fetters v. Humphreys*, 3 C. E. Green 260, and in the opinion of the Court of Appeals where the decree was affirmed, in 4 C. E. Green 471.

But fixing the height to which the defendant should be entitled to keep the water in the ninth clause of the will, although it does not expressly limit that as the height, must be held to limit the right to that height by implication. This implication is raised by the maxim *expressio unius est exclusio alterius*. This has been applied in many cases to limit the effect given by construction to grants and devises, as in the present case. In *Hare v. Horton*, 5 Barn. & Ad. 715, the Court of King's Bench so limited the effect of a mortgage. The mortgage conveyed an iron foundry and dwelling-houses, with the appurtenances, and enumerated afterwards the fixtures in the dwelling-houses. Had it not been for this enumeration the mortgage of the iron foundry would have carried with it all the tools and fixtures, including the steam engine, cranes, and presses fixed in the earth and walls, but these were held excluded by reason of the enumeration of the grates, boilers, bells, and other fixtures in the two dwelling-houses, and the brew-house thereto belonging. In *The King v. Sedgley*, 2 Barn. & Ad. 66, the same doctrine was applied to a statute. In *Sprague v. Snow*, 4 Pick. 54, the doctrine was applied to a case much like the present. A grant of enough of the water of a stream for the use of a falling mill was held to limit the grant of the water to that

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quantity, although the whole of the stream would otherwise have passed by the grant in the same conveyance of the land which included it. In *Hiscox v. Sanford*, 4 R. I. 58, the same application is made of the doctrine.

The effect of an express covenant in a deed or lease in limiting any implied covenant which might else arise, is well established. *Nokes' case*, 4 Rep. 80; *Merrill v. Frame*, 4 Taunt. 329; *Rawle on Covenants for Title* 356, (ed. 1860, 483.) I think there is no room for doubt on this question. There is no necessity, where the rule of law is clear, of sending the question to a court of law, or requiring the decision of a court of law in the case.

A second question arises as to the mark on the rock referred to in the will. The complainant asks that a certain mark on the rock be established as the mark referred to in the will, and as the limit of the height of the water. Although the defendant does not deny in his answer that this is the mark, he disputes it in his own testimony, and that of several witnesses. There is no dispute as to the identity of the rock. The defendant contends that the mark referred to in the will and in the certificate signed by him, was made on top of the rock, on a part that has since scaled off. The complainant contends that it is the mark now on the northwest corner of the rock. This is a mere question of fact. The testimony is contradictory. I think, by the clear weight of evidence, the mark now on the rock is the mark referred to in the will.

First. It corresponds with the description of the mark in the certificate. That is signed by the defendant, who made the mark, and he admits the certificate to be genuine and signed at the time; this describes the mark as on the northwest side and end of the stone, and a mark upward, about three inches from the end of the mark. The stone is nearly in the shape of an oblong parallelogram, one of its longer sides having the direction of a little east of north, so that this side is substantially the northwest side; it is the only one that can be called the northwest side. The mark begins on

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this side and is cut round the northwest corner and continued upon the end of the stone; the corner is not angular, but worn round; the mark has an upward mark, about three inches from its end. This mark answers, in every respect, the description in the certificate. On the other hand, the place where the mark is located by the defendant is where there is a scale broken off on the top of the rock near its centre. The top of the rock is not a plane or exactly flat, but it is so nearly flat that this spot could never have been described as the side or end of the rock, much less as the northwest side of the rock.

Secondly. The two attesting witnesses, Mellen and Sutton, who were especially called there as such, to see the mark made so as to identify it, testify that this is the mark, and give satisfactory reasons for their certainty. They both resided near the rock, and it could hardly have been altered so as to deceive them, without their knowledge. The mark made in their presence was on the corner, several inches below the top of the rock. The rock is a hard boulder, of that species of granite known as syenite, worn into its present condition by the attrition of probably some thousands of years, and, although it might be possible by cutting and grinding and attrition with sand, to wear down the top of this rock so as somewhat to resemble the appearance which the elements had given it, I think it would be almost impossible to deceive the experts who have examined it, and quite impossible to do this without attracting the attention of the neighbors. The complainant, Jonas Denton, the husband of Mrs. Denton, the devisee, was present at making the mark, and knew its object. He lived on this farm of his wife from 1848 to 1860, and superintended its cultivation. He drew the certificate, and testifies that it described the rock and mark correctly; he also is confident that the mark now there is the same. Thomas H. Vance was the son of the adjoining owner, and lived with his father, and worked on the farm at the time the mark was made; he examined it the day it was made; he was interested for his father's farm, and testifies

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without doubt that the mark is the one there now. He also measured the distance of the mark below the top of the rock by measuring the distance of both from the surface of the water when both were overflowed; he testifies that the mark was *then* from eight to ten inches below the top of the rock; this is as the mark is *now*.

The evidence of the defendant and several of his witnesses, who think that this is not the mark made in 1850, does not in my mind countervail or shake this testimony. The matter occurred to the defendant after the filing of his answer. His theory is that the mark which he made was on the top of the rock, where a scale of a foot in length by five or six inches wide appears at some time to have broken off the rock. This scale was about five-eighths of an inch thick at one edge, and tapered to a sharp edge at the other. It is possible that a mark could have been cut in this scale, but it is hardly possible that intelligent men should, in a certificate intended to be evidence, or to refresh their recollection as witnesses, have described this mark as on the side and end of the rock, if made on top of the scale.

This question was, perhaps, a proper one to be tried on an issue directed, if such issue had been applied for; but both parties having proceeded to take testimony at great length, and allowed the hearing to be brought on without applying for an issue, it is the province and duty of this court to decide it, if the evidence is such that I can arrive at a conclusion satisfactory to myself. I am entirely satisfied that the mark now on the rock is that made by the defendant in 1850, and that described in the certificate and referred to in the will. It must, therefore, upon the principle of law above stated, be the limit of the height to which the defendant is entitled to raise the surface of the water in the pond.

That the dam of the defendant raises the surface of the water in the pond higher than this mark is hardly disputed. It is charged in the bill, and is not denied in the answer. The evidence clearly shows that it has been kept so ever since the death of the testator. Where the fact of a nuisance is

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clear, especially when it is not disputed, a court of equity will interfere without a trial at law. This has been repeatedly held in this court. In the case of *Carlisle v. Cooper*, 4 C. E. Green 256, and in the same case, on appeal, 6 C. E. Green 576, this doctrine was acted upon, and the cases in which it was adopted are there referred to and commented on.

The right of the complainant is only as to the height of the water on her own land. And the right fixed by the will is only as to the height of the water in the pond flowing back over complainant's land; it has no reference to the dam or its height. If the defendant does not raise the water on her land above the lawful height, it is no concern of hers how high his dam is; but on the other hand he cannot keep his dam at any height, in such state that it throws back water higher than that mark. This was so held and decided in *Carlisle v. Cooper*.

There must, therefore, be a decree for the complainant, that the defendant is not entitled to raise the water in his mill-pond higher than the mark in the rock referred to in the ninth clause of the will of his father; and that the mark now existing on said rock is the mark referred to in the will, and is the limit of the height to which the defendant may raise the water at the upper line of the complainant's land; and that the defendant be forever restrained and enjoined from keeping or maintaining his dam at such height as will, in the ordinary state of the water, raise the water in the stream at that line, higher than the mark now existing at that rock.

EVANS vs. EVANS.

1. Where executors are directed by the will to pay money into the estate, and are personally bound so to do, and are directed out of such fund to pay a legacy to a co-executor, but fail to pay the money into the estate, such co-executor may bring suit in a court of equity in his individual right, against the executors individually, to compel the payment of the legacy.

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2. In any suit which necessarily should be brought by a complainant as executor against the defendants as such, if the allegations in the bill are sufficient to bring them before the court in that character, it is not necessary that they should be styled such, either in the process, or in the commencement of the bill, or in the prayer for process.

3. Ordinarily, it is not necessary to make debtors of the decedent parties to a bill against the executor by creditors or legatees. But when there is collusion alleged or suspected between the executor and the debtors, or he refuses to collect the debts, they are proper parties; and in case of a charge upon real estate, the heirs or devisees are proper parties with the personal representatives.

This cause was argued on a general demurrer to the complainant's bill. The bill set forth the will of Thomas Evans, the father of the complainant and of the defendants; and that the will was proved before the surrogate of the county of Burlington, in which testator resided, and that letters testamentary were, on the 24th day of May, 1869, issued by him to the complainant and the defendants, who were by it appointed executors. This will devised to each of the defendants certain tracts of land, subject to the payment by each of them of the sum of \$4500 to his executors, within six months after testator's death. The will gave to the complainant \$3000 out of the moneys directed "to be paid into the estate" by the defendants. It also gave to the executors in trust for the testator's son Thomas, \$6000 out of the amount directed to be paid "into his estate" by the defendants, and directed this \$6000 to be placed at interest, and the interest paid to Thomas. The bill alleged that the lands so devised to Samuel and William were respectively charged in effect with the payment of \$1500 by each severally to the complainant, and alleged refusal to pay, and prayed that they might be severally decreed to pay the same with interest, and in default, that the lands so devised might be sold. It also contained the general prayer for relief.

The complainant was not styled executor in the commencement of the bill, nor were the defendants styled executors in the prayer for process.

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Mr. F. Voorhees and *Mr. Ten Eyck*, for demurrer.

Mr. Merritt, contra.

THE CHANCELLOR.

The counsel for the defendant, in support of the demurrer, rely, first, upon the facts that such a bill is without precedent in courts of equity, and then upon the ground that this bill should have been filed by the complainant as executor against the defendants as executors, or that they should at least be made parties in their representative capacity.

No precedent has been shown for a suit exactly like this, but I think there are precedents founded on the same principle, which sustain this. The complainant, besides being an executor, is a legatee. His being an executor does not deprive him of his remedy in equity to recover his legacy. If it were a general money legacy, and they had exclusive possession of the personal assets out of which it must be paid, he could bring his suit against them as executors. Where one of several executors refuses to join in a suit for the benefit of the estate, the others can bring suit, but must make him a defendant; he is a necessary party, and must be made a party, either as complainant or defendant. In this case the defendants personally were bound to pay this money into the estate. Upon their failure to do so, he, as an executor, could file a bill to compel such payment. So long as they have not paid the money into the estate, the suit must be against them individually, to compel such payment. They have not paid it. If they had, the suit could be sustained against them as executors, to be paid out of this fund. This is a demonstrative legacy, and its payment cannot be enforced out of the general assets of the testator, but only out of the fund created and appropriated for it. In this case it must be held, as in the case of personal assets, that the executor who owes personally a debt, shall be held to have received assets to the amount of that debt; the suit might be maintained against them as executors. But that it might be so maintained,

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would not be permitted to defeat the complainant in a suit against them individually, even if the rules of equity required them to be styled executors, or the relief to be prayed against them as executors, in order to hold them as such. In this case the defendants are each bound to pay into the estate the one-half of the sum claimed by the complainant, and have not paid it; he is entitled to the whole sum, and is entitled to it against them. I see no reason why, with such a right, he may not have a suit in a court of equity for relief in his individual right for a duty due from them individually and directly. The situation of the parties as co-executors makes such remedy peculiarly appropriate, and there is no reason why one suit should be brought to compel them to pay the money into the estate, and another by him to compel payment out of the estate.

Ordinarily, it is not necessary to make debtors of the decedent, parties to a bill against the executor by creditors or legatees. But when there is collusion alleged or suspected between the executor and the debtors, or he refuses to collect the debts, they are proper parties; and in case of a charge upon real estate, the heirs or devisees are proper parties with the personal representative. *Story's Eq. Pl.*, §§ 178, 180. 2 *Williams on Ex'rs* 1832.

Here is what is at least equivalent to collusion, or refusal to collect. These defendants can, then, be held individually, according to these authorities. No objection can be made that the executors are necessary parties, for all three executors are parties to this suit; they are made parties with the proper allegations to maintain a suit as executor by the complainant, or to hold defendants as executors. Those allegations are the appointment, proving the will, and probate by the proper officer.

And was it necessary that this suit should be brought by the complainant as executor against the defendants as such, the allegations in the bill are sufficient to bring them before the court in that character. It is not necessary that they

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should be styled such, either in the process, or in the commencement of the bill, or in the prayer for process.

It is not necessary at law that it should be so stated in the process or in the commencement of the declaration. And where either party is there styled executor, it may be rejected as surplusage, and the suit proceed against or for him individually, though it is otherwise when the suit is brought by or against him *as* executor. 2 *Williams on Ex'rs* 1751, 1752; 1 *Chitty's Pl.* 252; *Watson v. Pilling*, 3 *Brod. & Bing.* 4; *Weavers' Co. v. Forrest*, 2 *Str.* 1232.

I know of no authority or precedent that establishes a different rule in equity. The proceedings in equity are and should be conducted with less regard to mere matters of form and technical objections than proceedings at law. There is no principle that requires a different rule. When a bill, in its body, sets forth fully facts which give the complainant a right as executor, or makes the defendant liable as such, so that the court upon these allegations can give the relief required, it is mere form and useless form, to require that either party should be so styled in the commencement or conclusion of the bill.

The demurrer must be overruled.

 MUSGROVE and others vs. KENNEL and others, township committee of Greenville.

1. A township committee in this state have no power to borrow money on the faith of the township, or to authorize any one to borrow money in the name of the township, or to bind the inhabitants to the payment of money so borrowed.

2. But if the members of the township committee can persuade any one to loan money necessary for township purposes, they are at liberty to do so; and the borrowing or expenditure of such money will not be restrained. Such borrowing cannot affect the township or any inhabitant, unless the inhabitants, at a regular town meeting, adopt the loan and assume the debt.

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The argument was upon a rule to show cause why an injunction should not issue to restrain the defendants from paying out moneys raised for school, road, and poor purposes, for any other purpose than that for which they were raised, and from borrowing any money in anticipation of taxes, and from expending any money already borrowed for any purpose whatever.

Mr. Winfield, for complainants.

Mr. McGee, for defendants.

THE CHANCELLOR.

The bill alleges that the defendants are about to expend the money raised by the vote of the inhabitants at the last annual town meeting for school, road, and poor taxes, for other purposes, and to pay the costs and expenses of litigation commenced by them against the township street commissioners. The answer denies that they have expended, or intended to expend, any of the moneys voted or raised for the purpose of repairing roads, maintaining schools, or supporting the poor, for the purposes stated in the bill, or for any other purpose than that for which they were raised. There is no proof that they have expended, or intended to expend, these moneys for such alleged purposes, and therefore the answer must be taken as true, and no injunction can issue as to that.

The bill further states that the town committee have authorized the treasurer to borrow \$2500, in anticipation of taxes, to meet bills against the township, and asks that they may be restrained from borrowing, and if moneys have been borrowed, from expending them.

The answer admits the passing of a resolution authorizing the treasurer to borrow money, and that the money has been actually borrowed. The township committee in this state have no power to borrow money on the faith of the township, or to authorize any one to borrow money in the name of the

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township, or to bind the inhabitants to the payment of money so borrowed.

The township committee are not the corporation; the inhabitants of the township are the corporation, and they act not through the committee as managers or directors, but by vote of the inhabitants assembled in town meeting. By the twelfth section of the township act the town committee are to audit the accounts of the township officers, and are to direct the expenditure of the money raised for the township purposes, but they have no power to raise any tax, or to bind the township by borrowing money. This power is nowhere directly given, and if it had been given it would entirely override and render useless the power given to the inhabitants to vote and grant the sums which they may deem proper for the several distinct township purposes designated; the town committee could borrow and expend for any purpose double the amount voted by the meeting, and the township would be compelled to pay the loan, and raise it by tax. Borrowing money can be no injury to any inhabitant or taxpayer; he cannot be compelled to pay any part of it unless the inhabitants at the next town meeting should vote to raise money for that purpose. If the members of the town committee can persuade any one to loan money on the faith that it will be applied to proper purposes, and if it is so applied that the inhabitants at the town meeting will see that it is raised and paid, they are at liberty to do so. If the committee and treasurer raise it on their personal responsibility they have that right. I see nothing illegal or inequitable in lending or borrowing money on the confidence that it will be raised and paid by the inhabitants. On the contrary, there may be, and often is, a very great convenience in doing it.

There are duties imposed upon townships, such as repairing roads and supporting the poor, that are imperative; an unexpected emergency may require the expenditure of more money than was raised by the inhabitants for the purpose, or before the amount voted is collected and paid into the treasury. In such case it is usual, and often wise and prudent, for the

Kamena v. Huelbig.

treasurer to borrow money for these purposes. It is generally done with the approbation of the committee, the proper body for expending the township money, and most likely to know of the necessity of it. I see no reason why the borrowing or expenditure of money for such purposes should be restrained.

The injunction must be refused.

KAMENA vs. HUELBIG and others.

1. An assignee takes a mortgage subject to all the equities to which it was liable in the hands of his assignor. And where the mortgage has been pledged as security for the payment of a note, he is entitled in a suit for foreclosure, only to a decree for the balance due on the mortgage, after deducting the amount of the note.

2. Where the mortgagor has paid the note, and the note and mortgage have been delivered to him, he is subrogated in the place of the payee of the note as his assignee, and will be allowed the amount as a credit on the mortgage.

3. A deduction allowed by the payee from the amount really due on the note, does not enure to the benefit of the assignee. A receipt being taken in full of the payee's claim on the bond and mortgage, the mortgagor is entitled to a credit on the mortgage for the full amount of the note.

4. The pledging by note of a bond and mortgage as security for its payment is a lawful pledge. It does not require a sealed or written instrument to assign a bond even at law. In this case a mere delivery of the bond and mortgage would have been sufficient.

5. This assignment does not come within the provisions of the second section of the act of March 14th, 1863, (*Nix. Dig.* 613,) requiring it to be in writing; but if it did, the written pledge in this case is sufficient.

6. That the maker of the note pledging the mortgage as security for its payment was a married woman, does not affect the validity of the assignment. Her husband was present when she gave it, and approved it.

7. That the complainant did not know of this assignment, does not affect it.

8. That the mortgagee did not have the bond and mortgage in her hands for delivery, at the time she assigned them, was notice to the assignee that they were held by some one as owner or claimant. But he was entitled to no notice; he took them subject to all equities in this respect.

Kamena v. Huelbig.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Hoffman, for complainant.

Mr. Winfield, for defendants.

THE CHANCELLOR.

The suit is to foreclose a mortgage dated September 24th, 1868, given by the defendants, Flentze and wife, to Elizabeth Huelbig, wife of Frederick Huelbig, to secure \$1563. On the 1st of December, 1868, Elizabeth Huelbig, in the presence and with the consent of her husband, gave a note to Margaret Dietrick for \$800, and pledged this bond and mortgage as security for its payment. The note containing the pledge was signed by Elizabeth Huelbig only. While the bond and mortgage were held on this pledge, Elizabeth Huelbig, with her husband, on the first day of May, 1869, by writing under their hands and seals, assigned the bond and mortgage to the complainant, which assignment was recorded on the tenth day of August following. Mrs. Dietrick retained the bond and mortgage, but the written pledge to her was not recorded, nor does it appear that the complainant had notice of it. The note to Margaret Dietrick not being paid, she instituted a suit to foreclose the mortgage. After this, on the 25th day of February, 1870, Flentze, to stop the foreclosure, paid to Margaret Dietrick \$732 in full for her debt, and took from her a receipt that it was in full for her claim on the bond and mortgage, and she delivered the note and bond and mortgage to Flentze, who still retains them. The amount paid Mrs. Dietrick was less than the amount due to her; she threw off part out of compassion for Mrs. Huelbig, who lost everything in the business for the purchase of which the note was given. The amount paid by the complainant for the assignment to him does not appear; the only conclusion to be drawn from the evidence is, that it was over \$100 and less than \$500. The complainant, when examined a little more than two years after the transaction,

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evades discovering the truth in a manner that must impair his character for fairness, and his credibility as a witness.

The defendant Flentze contends, that having paid this note to Mrs. Dietrick the assignee of the mortgage, he is entitled to be subrogated in her place as assignee, or to be allowed the amount as a credit on the mortgage.

The bond and mortgage were lawfully pledged to Mrs. Dietrick. It does not require a sealed or written instrument to assign a bond, even at law. It was so held by the Supreme Court in *Allen v. Pancoast*, *Spencer* 68. And in *Kinna v. Smith*, 2 *Green's Ch.* 14, Chancellor Vroom held that an assignment without seal was sufficient to pass the title to a mortgage for foreclosure in chancery, though it would not pass the lands so as to maintain ejectment. This assignment was in writing, but had it been by mere handing over the bond and mortgage, it would have been sufficient.

This assignment was not authorized by, nor does its validity depend upon, the act of March 14th, 1863, (*Nix Dig.* 613,) and therefore it does not come within the provisions of the second section of that act, requiring it to be in writing. But if it did, the written pledge in this case is sufficient.

That Mrs. Huelbig was a married woman does not affect the validity of the assignment. Her husband was present and approved the assignment, which removes all question as to the power of a married woman to assign her bond or note.

That the complainant did not know of the assignment, does not affect it. Such assignments are not required to be recorded, except as to the mortgagor, to protect him in payments and right to set off. There was no negligence by the assignee; she took possession of and kept the bond and mortgage; and the fact that the mortgagee did not have them to deliver at the assignment to the complainant, was notice that they were held by some one as owner or claimant. But no notice to him was required; he took them subject to all equities in this respect.

The title which the complainant acquired by the assignment was such as his assignor had at the time—that is, subject

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to the pledge to Mrs. Dietrick for the payment of \$800, with interest from December 1st, 1868.

By the payment of that debt, and the delivery of the note and bond and mortgage to him, Flentze stands in the place of Mrs. Dietrick, as her assignee in equity, and the complainant has no right at law or in equity to any advantage for the payment so made, nor to the deduction made by Mrs. Dietrick from the amount really due her on this transfer to Flentze.

The complainant is entitled to a decree for the amount due on the bond and mortgage, giving credit for \$800, as of December 1st, 1868, and for a sale of the mortgaged premises in satisfaction of that amount, but without costs. The litigation arose from his unjust and illegal claim.

THE NATIONAL BANK OF THE METROPOLIS vs. SPRAGUE
and others.

1. The only matter that can be considered upon exceptions to a master's report, is the validity of the exceptions. The question whether there should have been a reference having been considered and determined when the order was made, cannot be reviewed on the argument on the exceptions.

2. The rule of the court is, that the report of a master on matters referred to him, will be taken as correct, until some error is shown. The burden of this is upon the exceptant.

3. The fact that a report contains surplusage will not set aside the other part of the report or sustain an exception. But where the master has ascertained and reported upon matters which are in themselves mere surplusage, as a means of arriving at the conclusions which he was required to report, as such they are proper to be stated in his report.

On exceptions to the report of the master.

Mr. Williamson, for exceptions.

Mr. J. B. Vredenburg, for W. Stokes.

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THE CHANCELLOR.

By consent, the proceedings in several suits were in a manner consolidated, and the chattels included in several chattel mortgages were sold by a receiver under an order of the court before the final decree. One chattel mortgage was held by Klous and Hilbourn, one by Allen and Mitchell as trustees, and one by Woolman Stokes. These chattels were sold by the receiver in bulk. An order was made referring it to a master to ascertain and report what chattels, included in the mortgage to Stokes, were not included in the mortgage to Klous and Hilbourn, and also which of them were not included in the mortgage to Allen and Mitchell; also, to ascertain the value of such chattels and the amount that they brought at the sale; and also to report the amount due to Stokes on his mortgage. The master has reported on each point. To this report Klous and Hilbourn filed exceptions.

The only matter that can be considered here is the validity of these exceptions. The question whether there should have been a reference, so fully argued now, was considered and decided when the order was made, and cannot be reviewed on this argument.

The rule of the court is, that the report of a master on matters referred to him, will be taken as correct, until some error is shown. The burden of this is upon the exceptant.

The first exception is, that certain chattels reported by the master not to be included in the Klous mortgage, were, in fact, included in it. The charge includes four items, *viz.*: one hundred cots, three hundred pillow cases, four hundred and seventy-three cotton sheets, and all the crockery and glassware for the house. The evidence shows that one hundred cots were included in each mortgage. They may or may not have been the same; they may have been entirely distinct. The receiver may have sold two hundred cots. I am not able to determine this, as the inventory of the receiver, which was before the master, was not produced on the argument. The report may be right, for aught that appears, and therefore the exception cannot be sustained as to this. The same result

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must follow for the same reason, as to the three hundred pillow cases, and four hundred and seventy-three cotton sheets. The crockery and glassware for the house in Stokes' mortgage would, by the general nature of the words, include the seven hundred plates and six hundred dishes in the mortgage to Stokes. But these plates and dishes might have been broken or removed before the mortgage to Stokes, in the year 1866. The master may be authorized in so determining by some evidence before him. I am much inclined to think that this part of the master's report may be wrong, but I cannot hold it is wrong, and the amount concerned is too small to authorize setting aside a report from seeming probability.

The second exception is, that the master has reported the value of articles reserved by the receiver and articles not sold by the receiver, when that was not referred to him. Such report would be simply surplusage and would be disregarded; but the fact that a report contains surplusage will not set aside the other part of the report or sustain an exception. But in this case the master has ascertained and reported upon these matters as a means of arriving at the conclusions which he was required to report, and as such they are proper to be stated in his report.

The third exception to the report is the statement that the value of the chattels in the Stokes mortgage not in the Klous mortgage, and not sold at the receiver's sale, was only \$8390.-54, when they were worth much more. The language, both of the report and the exception, are a little confused and difficult to understand. But I take it to mean the value of such goods as were exclusively in the Stokes mortgage, which were neither reserved by the receiver nor sold by him; or, in other words, such of the goods as were missing. The exception varies materially from the report, but passing over the variance, I see nothing in the evidence to sustain it in point of fact.

The fourth exception, also, is not sustained in fact.

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KUHL vs. THE MAYOR AND COLLECTOR OF JERSEY CITY.

1. A party is not estopped by his acts or declarations from showing the truth, unless such acts or declarations were intended to influence the conduct of another, or he had reason to believe that they would influence the conduct of another.

2. A receipt for taxes on real property, given by a tax collector on receiving a check, does not estop him from showing that the check was unpaid, although a purchaser was induced by such receipt to pay the whole consideration. The collector did not give the receipt, knowing that it would be used for such purpose; nor does the mere giving of a receipt which is only a voucher of payment between the parties, and always liable to be disproved, raise the presumption that it will be used to defraud a purchaser.

This was an application for an injunction against the defendants, to restrain them from selling the lands of the complainant for taxes, at a sale for which they were advertised. The facts appearing by the bill and answer were, that the complainant purchased the lands in question of one Newkirk; that his counsel had procured a certificate from Love, the city collector, of the amount of taxes and assessments in arrear, being \$1491.50. That on the day when the deed was delivered and the consideration paid, Newkirk went to the office of Love and paid the arrears by giving a check on a bank in Connecticut, which the collector received, and he thereupon receipted the several tax bills for these arrears. Newkirk took these to the office of complainant's counsel; on the faith of this receipt the deed was accepted, and the consideration paid to Newkirk; the check of Newkirk was not paid, and the defendants, who had entered these taxes and assessments as paid upon the proper books, canceled the entry and advertised the land for sale. There was no agreement to accept the check as absolute payment. The only receipt was the words, "Received payment. Jas. H. Love, Collector," at the foot of the bills. There was nothing to show that Love had notice of the use to be made of these receipts. The complainant's counsel deposes, in an affidavit annexed to the

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bill, that when he asked for the search he told Love that a client of his was about purchasing the property. Love in his answer states that he had no recollection of this, either when he gave the receipts or at the time of the answer. The argument was on a rule to show cause upon the bill and answers of both defendants.

Mr. J. F. Randolph, Jr., for rule.

Mr. Dixon, contra.

THE CHANCELLOR.

There is no dispute that these taxes are unpaid. A check taken in the manner in which this was received is no payment, if dishonored. As between the defendants and Newkirk the taxes are clearly not paid.

The complainant contends that the defendants are estopped as against him from denying the payment, because by the receipt given to Newkirk they induced him to pay the full consideration, and it will be inequitable now to permit them to show that the receipt was not true, and that the taxes are unpaid.

In considering the question, I shall assume that Love had no intention to mislead the complainant, or to induce him to do as he did, and did not know that these receipts were to be used for that purpose. The fact stated by the counsel of the complainant some time before, could hardly be recollected by a public officer, in the numerous applications of this kind that constantly are made to him. Even without the denial of all recollection in his answer, such recollection would not be inferred from this fact.

There is a seeming conflict among the numerous decisions on the doctrine of estoppels *in pais*, sometimes called equitable estoppels, whether any one will be estopped by a representation made, which turns out not to be true, where there was no intention to influence the conduct of any one by it, and where it was not apparent that the representation would have

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that effect. I take the doctrine established, by the decided weight of authority, that there must be such intention, or that it must be so apparent that the representation will have that effect, that the intention must be presumed.

Lord Denman, in *Pickard v. Sears*, 6 *Ad. & Ell.* 469, lays down the rule "that where one by his words or conduct *willfully* causes another to believe the existence of a certain state of things, and *induces him* to act on that belief, the former is concluded."

Baron Parke, in *Freeman v. Cooke*, 2 *Exch.* 654, states that this rule, as laid down by Lord Denman, must be considered as established. He says: "By the term *willfully*, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe *that it was meant* that he should act upon it," it would estop.

Lord Campbell, in *Howard v. Hudson*, 2 *Ell. & Black.* 1, says it must be shown, "both that there was a willful intent to make him act on the faith of the representation, and that he did so act." And Justices Wightman, Erle, and Crompton take the same position in their opinions. All held that there must be an *intention* to influence.

Both Lord Chancellor Chelmsford and Lord Wensleydale, in their opinions in *Clark v. Hart*, 6 *H. L. C.* 633, approved of and applied the rule laid down in *Freeman v. Cooke*.

Chief Justice Nelson, in *The Welland Canal Co. v. Hathaway*, 8 *Wend.* 483, says: "A party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence."

In *Dezell v. Odell*, 3 *Hill* 222, Justice Bronson says, in adopting that view as his own, that "the learned judge did not lay down the rule with too much caution or with too many limitations." In the same case, Justice Cowen says: "We then have a clear case of an admission by the defendant in-

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tended to influence the conduct of the man with whom he was dealing, and which did so influence it to his prejudice. This I understand to be the only definition of an estoppel *in pais*."

In *Brown v. Bowen*, 30 N. Y. 519, Justice Mullin, in delivering the opinion of the court, in which all the judges concurred, says: "To establish an estoppel *in pais*, it must be shown that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct."

In *Wileox v. Howell*, 44 N. Y. 398, Commissioner Earl, in delivering the opinion of the court says the doctrine of estoppel *in pais* "is only applied to conclude a party by his acts and admissions intended to influence the conduct of another."

In *Turner v. Coffin*, 12 Allen 401, the court expressly held this doctrine and the decision turns upon it. The verdict was set aside because the court did not charge the jury that the plaintiff must have *willfully intended* that the silence and conduct on his part, should lead to action on the part of the defendant. This view is approved in *Pierce v. Andrews*, 6 Cush. 4.

In *Yarger v. Manning*, 1 Vroom 183, Justice Brown, in delivering the opinion of the court, says: "A plea of title, if an estoppel, must be such *in pais*, and on the ground of willful misrepresentation by defendants, on which the plaintiff was induced to act to his injury. There is no evidence of willful misconduct."

The American editors of Smith's Leading Cases, in their notes to *Den v. Oliver*, Vol. II. 643, 646, adopt this doctrine requiring an intention to influence, or that the influence must be clearly foreseen to create an estoppel; and hold also, that a declaration to one man can rarely operate as an estoppel in favor of another.

This limitation is also clearly and positively laid down in *Herman's Law of Estoppel*, §§ 327, 331, 426.

If it was held that the collector or the city were estopped

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by such a receipt, it would, of necessity, put an end to the convenient practice everywhere adopted, of paying taxes by checks; every tax-payer would be obliged to produce and count out legal tender notes.

Tax receipts are only intended as evidence in favor of the tax-payer against the city, not as muniments or evidences of title. The defendant, Love, in this case, did not intend it as such, and this must have been known to the complainant. Simple receipts have always been held not to conclude the person giving them. They are not like commercial paper, negotiable, nor intended for such purposes; but, like a bond or mortgage, are subject to all equitable defences. The obligor of a bond might be held in like manner to have induced an assignee to take it; the bond being a representation that the obligor owed and would pay the money. This doctrine has never been applied to bonds or mortgages, and would change the entire status of them.

The giving this receipt by Love was not culpable negligence or carelessness; it was done according to the usual course of business, relying upon the rule that if the check was worthless the receipt was also of no validity, except to change the burden of proof. This was known to the complainant.

The injunction must be denied.

DEY and others vs. DEY and others.

Bill to restrain purchaser of a mortgage from a trustee from using and misapplying trust funds. The answer formally denied the facts, but injunction continued till final hearing, on the ground that the purchaser had knowledge of circumstances which should have excited his suspicion, and put him upon inquiry.

This was a motion to dissolve an injunction. Argued upon bill and answer.

Dey v. Dey.

Mr. I. W. Scudder for motion.

Mr. Borchertling, contra.

THE CHANCELLOR.

The defendant, James R. Dey, assigned to the defendant, Foster, a bond and mortgage for \$7000, which he held in trust for the complainants as surviving trustee, under a trust declared in a deed to him and Jacob C. Dey, for the benefit of the complainants. The mortgage was held as the residue of the proceeds of the trust estate directed to be invested for the benefit of the complainants. The bill charges that James R. Dey assigned the mortgage to Foster for a precedent debt, and that Foster took it by fraud and collusion with him, and that James R. Dey appropriated the proceeds to his own use, and shortly after became bankrupt, and was discharged under the bankrupt law; and charges the assignment to be a fraud on the estate.

Dey has not answered. Foster in his answer denies that the mortgage was taken for a precedent debt, or that he knew that Dey was insolvent, or that he intended to appropriate or misapply the money. He denies the charge that he was connected in business with Dey, but admits that he had for years occupied the same office with him, and had been his agent for the sale of fertilizers manufactured by him.

The answer seems to contain formal denial of the facts relied upon and required to make a purchaser from a trustee liable for his misapplication of the trust funds. But it admits knowledge that Dey held this as trustee and surviving trustee, and that the transfer was made shortly after the death of the co-trustee, and before his representatives had executed the assignment to Dey supposed to be necessary. There are many circumstances that should have excited his suspicion, and put him upon inquiry. The fact of the sale of a trust mortgage at a deduction from its face, for the difference of the rate of interest, was suspicious, and should have caused inquiry. These circumstances, with the fact that Dey has not answered

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the bill, are sufficient to make the case a proper one in which the court should exercise the discretion vested in it to retain the injunction until the hearing.

The motion is denied.

FREY vs. BOYLAN and wife.

1. Bill for specific performance of a parol contract to convey lands. No contract proved.

2. A married woman having released her dower by joining in a conveyance made by her husband to B, cannot demand her dower against A, who becomes seized of the lands by a title superior to that of B. Her dower once extinguished cannot be revived.

Argued on final hearing upon bill, answer, replication, and proofs.

Mr. Hill, for complainant.

Mr. Boylan, *pro se*.

THE CHANCELLOR.

The complainant asks for a decree to compel the defendants to execute a deed to him in specific performance of a parol contract, alleged to have been made by the defendant, James H. Boylan, with him. The defendants, by their answer, responsive to the statement in the bill, deny that there was any parol contract made by Boylan, or any one for him, to convey the lands in question. There is no proof of it, even by the complainant himself. Boylan and one Harriott owned adjoining tracts, subject to the same encumbrances created by their common grantor. Harriott negotiated with the complainant for the sale of both tracts for the price of \$3400, but without any authority from Boylan, and Boylan had no negotiation with the complainant. He was not willing

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to sell at that price, and at first disagreed to the sale made by Harriott, but at last consented that a deed might be made to Harriott by the sheriff for his part. The sheriff had sold this part under a judgment against Boylan's grantor prior to the conveyance to Boylan, and he had bid off the property at the sheriff's sale, but had not taken the deed. The complainant agreed to accept, and did accept the sheriff's deed for Boylan's part, in fulfillment of the parol contract with Harriott, and paid to Harriott the \$3400, and Harriott paid to Boylan his share of the excess of this amount above the encumbrances. Boylan, who is an attorney-at-law, told Harriott that the sheriff's deed was as good a title as a deed from him, and that it was a better title, as it cut off all encumbrances.

There was clearly no parol contract to convey. He consented that his bid at the sheriff's sale might be transferred to the complainant, so as to enable Harriott to carry out his arrangement. The complainant agreed to accept this as a fulfillment of the contract. Boylan did not act as his counsel or legal adviser, and stood in no confidential relations with him, and complainant acted at his own peril in relying on Boylan's opinion or representation as to the sheriff's deed. No fraud is shown. Boylan swears that it was, and is still his opinion.

But there does not appear to be any title left in Boylan to convey. It nowhere appears that the wife of Walsh, the grantor of Boylan, was his wife at the date of the judgment, or that she is now living; both these facts are necessary to create any cloud on the title. Besides, Mrs. Walsh, by joining in the deed to Boylan, extinguished and barred her right to dower. She can never claim it, nor can any one in her name or as her assignee; the first section of the dower act, and the fourth section of the act respecting conveyances, must be regarded as settling that question. No one can claim, as assignee, a right that is barred or extinguished.

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ARMSTRONG vs. POTTS.

1. An injunction will not be dissolved or refused upon new matter set up in the answer, not responsive to the bill.

2. An agreement between two proprietors upon the same stream, that the upper proprietor shall have the right to discharge all the waters drawn from a canal feeder over the lands of the lower proprietor, and that the lower proprietor shall be entitled to have all the waters drawn from the feeder flow over his lands, entitles the lower proprietor to the flow of all the water actually drawn from the feeder, although in excess of the quantity which the upper proprietor has the legal right to draw from the feeder.

This was a motion to dissolve an injunction heretofore granted, made upon the answer of the defendant.

Mr. J. C. Potts, for motion.

Mr. J. Wilson and *Mr. Richey*, contra.

THE CHANCELLOR.

The Delaware and Raritan Canal Company, in the year 1832, constructed the feeder for its canal through the city of Trenton. In doing this the company took lands of William Potts, under whom the defendant, William H. Potts, derives title, and in passing through his land stopped the flow of a great part of the water of Petty's run, a stream which passed through his land and through lands of others, and emptied into the Delaware. This stream was used for water power on the lands of Potts and of some others of these owners. The company, to restore to Potts the water thus taken away, permitted him to construct a trunk from the feeder, by which water was taken to turn the wheel of his mill. This water was supplied in greater quantities than the natural flow through Petty's run, and some of the owners below, who did not use it for water power, and were injured by the excess of water, brought suits for the injury. In August, 1848, an agreement was made between these owners and Potts to com-

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promise these suits and settle the difficulties between them. There were six parties to this agreement, including all the owners of land between the feeder and the Delaware. Henry P. Welling, under whom the complainant, Armstrong, derives title, was one of these parties. By this agreement Potts granted to each of the other parties and his heirs and assigns the right of flowing the water drawn from the feeder, as the same was then done, over his lands along and under Petty's run ; and he covenanted with them that he and his heirs and assigns would keep open, and suffer them to keep open, the gate or gates at his upper tan-yard, so as to permit the water to be drawn from the feeder to flow through, and best promote the beneficial use of it at the several mills upon the stream.

At the date of this agreement there was a trunk constructed from the feeder to the mill, on Potts' upper tan-yard ; from this there were two gates—one to let the water on the mill-wheel, called the wheel-gate, and another called the side-gate, at one side of the wheel, which was opened to let down the water when the wheel-gate was closed, so that the owners of the lands and mills below should have the constant use and benefit of the flow of the water through their premises.

Each of the other parties granted to Potts, and to each other, the right of flowing the water drawn from the feeder over his lands along Petty's run.

To this agreement, which was under seal, there was appended a written memorandum, signed by three of the parties, William Potts, Isaac Dunn, and H. P. Welling, by which they agreed that the trunk, from the feeder to the head-race at Potts' upper yard, should be repaired, kept up, and maintained at their joint expense.

From the date of this agreement to the interference complained of in 1869, the water which flowed from the feeder in the trunk thus constructed, had been permitted to pass down Petty's run through the two gates mentioned ; the side-gate being raised when the wheel was stopped and the wheel-gate closed. The complainant, who had purchased the lands

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and mill of Welling, and had enlarged the mill and works, was permitted to place an automatic mechanical contrivance at these gates by which the closing of the wheel-gate opened the side-gate, which was again closed when the wheel-gate was opened.

The complainant having refused to pay some claim made by the defendant for repairs, the latter closed the side-gate and refused to allow the complainant to open it, thus depriving him of the benefit of the water drawn from the feeder, except at such times as the wheel-gate was open.

These facts stated in the bill are not denied by the answer, except that it is denied that the closing of the side-gate, or any other act of the defendant, intercepts the flow of all the water. The answer states that a flow of water equal to sixty-four square inches drawn under a head of four feet, has not been stopped or intercepted, but has constantly been permitted. The answer further sets up that the water was drawn by virtue of agreements with the canal company—one of which was with William Potts, and the other with Garret D. Wall through whom the complainant derives title—that the water to be drawn from the feeder was to be the quantity of sixty-four square inches, drawn under a head of four feet; and that the complainant has no right to have any more water flow to his land from the feeder than this quantity.

In the first place, these agreements are set up in the answer not in response to the bill, but in avoidance, and in limitation of the rights claimed in it; and by the settled practice of this court, an injunction will not be dissolved or refused upon new matter set up in the answer not responsive to the bill. This was so held by Chancellor Green in *The Society v. Low*, 2 C. E. Green 26; by Chancellor Williamson in *Green v. Pallas*, 1 Beas. 267; and in *Butler v. The Society*, *Ib.* 264; in which case on appeal, (*Ib.* 506,) the doctrine was recognized in the Court of Appeals in the opinion of the court delivered by Green, C. J. Chancellor Kent so held in *Min- turn v. Seymour*, 4 Johns. Ch. 499, citing as authority *Allen v. Crabcroft*, *Barnardist. Ch. R.* 373.

But if these agreements were properly before the court,

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they cannot qualify the agreement of August 5th, 1848, upon which the question here depends. That agreement was not for flowing the water which the parties were *entitled to draw*, but “the *water drawn* from the feeder.” This must mean either the water drawn by the trunk as it then was, or the water that should at any time be drawn from the feeder. This has always been in excess of sixty-four square inches. It may be that the company has the right to restrict the water drawn from the canal to sixty-four inches under the given head. If it has that right and does withhold all over that amount, the complainant has no claim against Potts for this. But when the company allows more water to be drawn, and it is drawn, the complainant has by this grant a right to have the amount actually drawn flow over the land of Potts, and through one of the two gates, to his mill. Potts has the corresponding right; if he draws four hundred instead of sixty-four square inches from the feeder, he has the right to pass it over the complainant’s lands to the Delaware. This was one of the main objects of the agreement which contains the grant. Some of the parties had agreements with the company, others had none. It cannot be supposed that such as had none intended to subject their lands to a burden and gain no right in return. The plain intent, as gathered both from the words of the agreement and from the circumstances under which it was made, was to give all the lower owners the right to have all the water drawn from the feeder pass through these gates, as the same was done at the date of the agreement—that is, by having one of the two gates always open; and on the other hand, to give Potts the right to pass all the water drawn by this trunk from the feeder away from his lands in like manner. It was not intended to confine the quantity to sixty-four inches or any other limit.

If it did not appear in what manner these gates were kept open at the date of the agreement, the provision that they were to be used in such manner as would best promote the beneficial use of it at the mills, would require one gate to be always open.

The motion to dissolve must be denied.

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WORRELL vs. THE FIRST PRESBYTERIAN CHURCH OF
MILLSTONE.

1. An objection that the corporate character of the defendants does not sufficiently appear by the bill, and that no proper averments are therein made of ecclesiastical relations and rules, which have been waived or substantially supplied by the answer and proofs, cannot avail at the final hearing.

2. It is no valid objection to the action taken at a meeting of a congregation, that members of the congregation were absent, or being present did not vote. Where a society is composed of an indefinite number of persons, a majority of those who appear at a regular meeting constitute a body to transact business. The presumption is that all the members present who observe silence when a question is put, concur with the majority of those who actually vote—that is, if the question be put audibly and explicitly.

3. The pastoral relation is for religious and not mercenary ends, but the contract involved in it imposes pecuniary obligations and gives pecuniary rights which the law enforces and protects, and the surrender of those rights, when it involves matter of pecuniary loss, is lawful matter of pecuniary compensation, and is a valid consideration for a contract to pay money.

4. In Presbyterian societies the congregation are the substantial beneficial owners of the church property, and the trustees the legal instruments to execute their will.

5. Trustees have no legal right to attempt to defeat an agreement entered into by the congregation.

6. Where a congregation has agreed to allow a credit to its pastor of \$2000 on a certain bond given to the corporation, and the trustees have acquiesced in that agreement, the pastor is entitled to an injunction to restrain an action at law upon the bond, and the trustees cannot, in such a suit, thwart the wishes or deny the power of their *cestui que trust*.

The cause was argued upon the pleadings and proofs, before the Vice-Chancellor.

Mr. McLean and *Mr. J. Wilson*, for complainant.

Mr. W. H. Vredenburg and *Mr. Dixon*, for defendants.

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THE VICE-CHANCELLOR.

The parties to this suit are the Rev. Charles F. Worrell, D. D., and the First Presbyterian Church of Millstone, in the county of Monmouth. The complainant was pastor of the church from the early part of 1842 to the 9th day of March, 1868, with an annual salary, prior to 1860, of \$400, besides the use of the parsonage farm. The salary was afterwards raised to \$600, of which \$500 was actually paid. At a congregational meeting on the 25th of July, 1867, it was resolved, in view of the dilapidated condition of the parsonage, its distance from the church, and the existence of a debt for back salary, to sell the parsonage for \$4000, and the trustees were directed to execute a deed to the purchaser. From the proceeds of sale the sum of \$2700 was to be invested on bond and mortgage for the purchase of another parsonage, and the balance, after payment of the salary debt and some outstanding bills, was to be paid to the pastor for the improvements, buildings, materials, and repairs done by him on the premises during the previous twenty-four years. The interest of the invested fund was also to go to him while remaining the pastor, in lieu of the use of the parsonage itself, which use was included in his call. The refusal of the premises was given him at the specified price, and he accordingly became the purchaser. The deed was made for his use, at his request, to his son Henry, who gave back his bond and mortgage for \$3000 of the price, the remaining \$1000 being allowed in settlement of the indebtedness due Dr. Worrell. Henry Worrell afterwards conveyed to his father. Shortly after the sale, certain members of the congregation, about twenty in number, being dissatisfied with the ministrations of Dr. Worrell, memorialized the presbytery in regard to a dissolution of the pastoral relation, and that body appointed a committee of three ministers and two elders to visit the church and confer with its pastor and officers. A committee of the congregation, composed of nearly all of the elders, deacons, and trustees, met the presbytery committee at the church in Millstone, at two P. M. on Monday, the 28th of

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October, 1867, and continued their discussions till late in the evening, without reaching a satisfactory result, when the committee of the congregation was requested to withdraw to enable the committee of presbytery to come to some conclusion and make some report. Upon again being convened, the chairman of the latter committee presented a preamble and agreement as a basis of settlement, proposing its adoption, then to be afterwards submitted to the congregation for its action, at a meeting to be called for that purpose. It was, in substance, an arrangement by which the pastor should tender his resignation, to take effect on the 9th of the following March, and in consideration of his so doing, of his long continued services to the church, of the scanty support he had received, and his inability to lay aside from it any provision for old age, a donation should be made him by a credit on the amount of the mortgage. Discussion ensued as to how large this credit should be, and different sums being named, it was finally fixed at \$2000. The paper was then signed by eleven of the congregational committee, five of the signers being trustees, six being elders or deacons.

A meeting of the congregation was soon after called by a notice, as follows: "At the request of the officers of the First Presbyterian Church of Millstone, and of the committee of presbytery, there will be a meeting of the congregation of said church in the church edifice, on Wednesday, November 13th, 1867, at two o'clock P. M., for the purpose of considering and acting upon an agreement made by the officers of the church with the committee of presbytery to make a pecuniary consideration to the pastor, in view of his proposed resignation, and in case of his resignation, to appoint commissioners to presbytery." This notice was dated the 1st of November, and was signed by Isaac Hutchinson, trustee, and Austin Rue, elder; both of whom had signed the agreement of the 28th of October.

The congregation met in pursuance of it, and was organized by the election of a chairman and secretary. The minutes of this meeting, signed by these officers and authenticated

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by their testimony as witnesses, are in evidence. The preamble and agreement of the 28th of October were read, together with the minutes of that meeting, when the following was moved and seconded: "*Resolved*, That we, the congregation of the First Presbyterian Church of Millstone, Monmouth county, New Jersey, now assembled, in view of our pastor, Rev. C. F. Worrell, having spent all his ministerial life with us in ardent and successful labor, upon a salary entirely inadequate to his comfortable support, while expending much in behalf of the congregation, approve and ratify the action and proposal of the joint officers, trustees, elders, and deacons of the church, October 28th, 1867, in tendering him a pecuniary offering, and we, the congregation, hereby order that a credit be given him of two thousand dollars, upon the bond and mortgage held by the congregation upon the former parsonage farm, in his behalf as pastor." At this point three of the signers of the agreement, two being trustees and one an elder, denied signing the agreement as stated, contending that the paper had been altered and enlarged, and that they had only signed to bring the whole matter before a congregational meeting. After warm discussion, a motion to adjourn was negatived by a decided vote. The main resolution was then put and adopted by a large majority—first by uplifted hands, and afterwards by the voters rising in their seats. The chair decided that all the signers of the agreement presented by the presbyterial committee had thereby voted in the affirmative, and their votes would be so counted. Fifty-eight persons voted for the resolution. These, added to the eleven signers of the agreement, made the total affirmative vote, sixty-nine. The negative being put by the chair, twelve or thirteen votes were cast against it, as near as could be ascertained, as there was then some confusion in one portion of the house—a number of persons rising and going out.

A resolution was adopted directing a credit of \$2000 to be put upon the bond, and prescribing its form. The pastor declared his purpose to resign his pastoral charge at the forth-

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coming meeting of presbytery, and requested the congregation to appoint commissioners to presbytery to attend to the same. Four commissioners were appointed. On the 9th of the following December the presbytery met, and the pastor and commissioners appeared and were heard. The call for the congregational meeting and the minutes of that meeting were read, when one of the commissioners presented a protest, signed by himself and six members of the congregation, not commissioners. This protest concurred in and warmly recommended the dissolution of the pastoral relation, but remonstrated against the manner of it, and urged considerations at length why so large a credit should not be given.

The presbytery adopted the report of its committee appointed to visit the church, and declared the pastoral relation dissolved, to take effect from the 9th day of March next ensuing. It did so take effect. On the 21st of the following August Dr. Worrell paid to the president of the board of trustees the balance due on the bond, deducting the \$2000 claimed as a credit; an endorsement of that credit having been by himself, or some of the church officers, more than once previously demanded and refused.

On the 10th of December, 1868, an action in the Supreme Court was begun on the bond in the name of defendants, when the complainant filed his bill to have such action restrained, the credit decreed to be allowed, and the bond and mortgage delivered up to be canceled. An answer was filed and the cause brought to hearing on the pleadings and proofs.

At the argument objections were made to the informalities and defective allegations of the bill: that the corporate character of the defendants does not sufficiently appear; that no contract is set out with the corporation as such, and no proper averments are made of ecclesiastical relations and rules. Whatever force these objections might have had at an earlier stage of the cause, they cannot avail now. The defective allegation of corporate character and ecclesiastical rules have been waived or substantially supplied by the answer and proofs. The answer itself is defectively made, but the corporate



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existence has been abundantly shown, and assumed by both sides to arise under the act to incorporate the trustees of religious societies. *Nix. Dig.* 802. The relations of the congregation to the presbytery, the authority and action of that body, and the book of government, have been recognized and relied on directly or implicitly by both sides in the proofs and the argument, and I therefore take them to be legitimate matters of consideration in disposing of the case.

A contract to credit complainant with \$2000, if alleged in the bill to have been made by the *defendants*—that is, by the *trustees as a corporate body*—would have been of no practical use, for, in fact, no such contract has been proved. The writing signed at the October meeting of the committee is clearly not such. It was signed by five of the trustees, but only as individuals, in connection with others, and cannot be regarded as a corporate act. It was, at most, an agreement to submit the stipulations to the action of the congregation, and while evincing perhaps the views which the trustees individually held, whose right and province it was to give such a credit, and by whom such an agreement could be properly and efficaciously made, it could clearly form no basis for an action at law against the corporation, or any ground in equity on which specific performance could be enforced.

The committee meeting of October seems to me to have been one to inquire, consult, and advise. I can assign no higher authority or more binding obligation to the agreement then signed, than would belong to the suggestions or recommendations of a report. Those who signed it were not bound to adhere to the views it expressed, or to urge the congregation to adopt them, if, upon reflection or increased light, such views were perceived to be wrong. This being so, they were free to vote at the congregational meeting as they deemed to be right.

Much of the evidence and argument in the case was directed to the proceedings of that October meeting, and the complainant's claim discussed as if the trustees or corporation

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as such, were sought to be bound by a contract then made. But it seems to me plain that the essential questions in the case relate to the meeting of November 13th, and to what was done in pursuance of it. This religious society is assumed to exist under the provisions of the general act, and presents, as was said by the Supreme Court of the state in *Miller v. Baptist Church of Allowaystown*, 1 Harr. 251, a threefold aspect. *First*. The congregation that usually meets together for religious worship and instruction; *secondly*. The church, strictly so called, composed of those entitled to full church privileges; and *lastly*, the trustees or corporation.

The president of the corporation refused to allow the credit voted by the congregation, and afterwards caused a prosecution at law to be commenced on the bond. The trustees, as individuals, differed in opinion as to the allowance of the credit, and took no action, as a body, respecting it, till some weeks after the prosecution was begun, when, at a meeting on the 16th of January, 1869, five of their number being present, the course of the president in that behalf was approved. The answer is sworn to by five of the trustees, but is not under the corporate seal, and does not appear to have been made by any vote of the trustees acting in their official or corporate capacity. It must now, however, be treated as if formally executed, and disposition made of the substantial merits of the controversy, as disclosed upon the whole case and discussed in the arguments.

It is insisted for the defendants that the congregational meeting of November 13th was irregular in its proceedings, and for that reason its action invalid; that the arrangement or agreement then adopted by which the pastor was to resign and \$2000 to be allowed him was a *nudum pactum*, without consideration, and cannot be enforced; and *lastly*, that the congregation had no authority to make such a contract, if otherwise good; that the defendants are not bound by it, and this suit against them cannot be maintained.

The meeting was regularly called. The notice above recited was explicit and full in its terms, and is not denied to

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have been properly published. The objects stated were to act upon the agreement of the October meeting, and in case of the pastor's resignation, to appoint commissioners to presbytery to carry it into effect. But it is said that considerable numbers were absent or did not vote; that the pastor was active in securing the attendance and votes of those favorable to himself; that he participated in the discussions of the meeting and denied the right of those who had signed the October agreement to vote against its stipulations, insisting that their votes should be counted in the affirmative, and they were accordingly so counted. Whatever may be thought of the complainant's conduct respecting that meeting on the score of propriety and taste, I can see no objection to it legally. By the permission of the meeting he was heard for himself. When the circumstances of his age, his long pastorate, and his pecuniary means, are considered, I can find nothing in his action to wonder at, certainly nothing to justify the appellation of fraud. In the idea that the signers of the October agreement were to be counted in the affirmative, he was wrong and had been wrongly advised, but the error made no important difference in the general vote. Three of such signers claimed to vote in the negative and were counted in the affirmative. If counted as they should have been, the vote would have stood sixty-six in favor, and sixteen or perhaps seventeen against.

Nor can it form any valid objection to the meeting that members of the congregation were absent, or, being present, did not vote. Where a society is composed of an indefinite number of persons, a majority of those who appear at a regular meeting constitute a body to transact business. The presumption is, that all the members present who observe silence when a question is put, concur with the majority of those who actually vote—that is, if the question be put audibly and explicitly. *Angell and Ames*, §§ 497, 499; *Miller v. English*, 1 Zab. 317.

Was the agreement to give the credit without *consideration*, and therefore void? The defendants insist that whatever

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indebtedness existed to the complainant was adjusted and settled at the conveyance of the parsonage farm; that the \$1000 then allowed was in full of all claims; that the further sum of \$2000 was simply a gift, with nothing to stand on but the promise to resign, which promise they say was no equivalent for the credit and was insufficient to support it. The evidence is, that when the complainant purchased the farm, the \$1000 was a jumping or compromise sum less than was believed to be due, and on the belief that he was to continue the pastor and not chargeable with interest on the mortgage. There is nothing in the transaction to bar the additional remuneration that was afterwards thought due. Had a clear duty existed to resign, a promise to do so for money would be called correctly a *nudum pactum*, or worse. But no such duty appears. A few wished him to do so, but the large majority not. On their part and on his part, it was a concession for the sake of harmony to the minority views. The pastoral relation is for religious and not mercenary ends, but the contract involved in it imposes pecuniary obligations and gives pecuniary rights which the law enforces and protects. I can see no reason why the surrender of those rights may not be lawful matter of pecuniary compensation whenever matter of pecuniary loss. That it was matter of loss, in this case, is plain. To meet it, and at the same time supply the deficiencies of the past, is, in my judgment, a very just and obvious foundation on which the agreement to give the credit of \$2000 can stand. It appears from the proofs to have been conceded by all that *some* allowance should be made. The obligation to pay *something* does not seem to have been questioned, but only the amount. The *consideration* was not doubted, but the *measure* of it. This is shown by the discussions of the October meeting, by the testimony of the trustees, or some of them, now defending this suit, and by the terms of the protest to presbytery on the 9th of December. I am of opinion, therefore, that the promise of the congregation had a good and lawful consideration to support it; that there was no want of mutuality; and if the congregation had power to

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bind the defendant corporation, the agreement having been performed on the one side, should be decreed to be performed on the other.

Had the congregation this power, or are the defendants in any wise bound? In Presbyterian societies the pastoral relation is established and discontinued not by the trustees or by the church, but by the congregation and the pastor, under the sanction of the presbytery. The call proceeds from the congregation, contains the agreement to pay the salary, and is subscribed by their elders and deacons, or by their trustees, or by a select committee, as the congregation shall appoint. It is presented to the minister only through the presbytery, and will not be effectuated without its approval. The authorities and controlling power of the congregation recognized in the book of government, is *exemplified* in the *practice* of these societies. The congregation direct the trustees. The former act as the substantial beneficial owners, the latter as the legal instruments to execute their will. This is shown by the defendants' book of minutes to have been the theory and the practice of the society, whose trustees they are. This construction, so long and generally acted on, was declared to be law by the Court of Appeals in the case of *Rose v. Morgan*, 7 *C. E. Green* 583. It was held in that case that the statute under which this society is formed creates only a simple trust, so that the trustees must hold and dispose of the property in conformity to the directions of their *cestui que trust*, who may be either the congregation or certain officials, according to the rules or discipline of the particular church or society. In the light of this decision, I can see no propriety or legal right in the attempt of the trustees, defendants in this case, to defeat the agreement entered into by the congregation, and especially after that agreement was sanctioned by the presbytery and acted on by the complainant. After the November meeting of the congregation, the trustees took no steps, as a body, to express their dissent, or make known their purpose, if such purpose they had, to resist the allowance of the credit.

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In the case of *Miller v. Baptist Church*, 1 Harr. 251, it was held, in an action by the minister for his unpaid salary, that unless the trustees, as such, are parties to the contract no action *at law* can be sustained against the corporation. But it was also held that when the society has regularly employed a pastor, it becomes the duty of the trustees to fulfil their trust by exerting the means in their hands to provide the stipulated support. And where their dissent does not expressly appear, it is to be presumed that they have undertaken to perform their duty. On these principles the action against the corporation in that case was sustained though no express contract between it and the plaintiff was made out by the proofs. The same principles are applicable here. Having acquiesced in the action of that meeting, and allowed its consummation by the presbytery in the following month, and the removal of the pastor from his place on the faith of what was then agreed to be done, they cannot now thwart the wishes or deny the power of their *cestui que trust*.

I respectfully advise a decree in accordance with the prayer of the bill.

WRIGHT vs. SMITH.

1. A trustee, so far as the trust extends, can never be a purchaser of the property embraced under the trust, without the consent of all persons interested.

2. The rule extends to all cases in which confidence has been reposed and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are engaged for that purpose and paid for it.

3. The amount for which the mortgage, against which relief is sought in this case, and which was fraudulently procured, should stand as security, determined; and decree that upon payment thereof the mortgage and bond secured by it be given up to be canceled.

This cause was heard by the Vice-Chancellor, upon the pleadings and proofs.

Wright v. Smith.

Mr. Coult and Mr. Van Blarcom, for complainant.

Mr. Hamilton and Mr. Kays, for defendant.

THE VICE-CHANCELLOR.

The bill in this cause prays relief against a mortgage, on the ground that it was fraudulently procured. The complainant, Benjamin H. Wright, is a resident of Rome, in the state of New York, and the defendant, James Smith, of Newton, in this state. Wright, being the owner of a certain interest in some mineral lands in the county of Sussex, and desirous of purchasing the fee of the lands, (the same being about forty acres belonging to one Ackerson,) and wishing also to buy an adjoining tract called the Howell farm, made known his wishes in 1869 to the defendant, who was acquainted with the premises, and had done business with the complainant some years before. Wright had received in some way exaggerated impressions of the prices that would be asked by the owners, but was anxious to buy, and told Smith about what sums he would be willing, if necessary, to pay. These sums were not to exceed \$4000 for the Ackerson land, and \$7500 for the Howell farm. Smith undertook, as a friend, to negotiate for their purchase, and from that time till in the spring of 1870, was more or less in treaty with the two owners, keeping also in communication with the complainant, receiving from and sending letters to him about the terms and progress of the bargains. Smith, it was thought, could buy to better advantage than Wright, and the latter was, therefore, not to be known to the owners, but was to take title to the properties through Smith.

On the 25th of August, 1869, Smith wrote to the complainant that he would endeavor to make the arrangement for him with Ackerson, if possible, in as short time as he could, and would let him know how the whole matter stood as far as lay in his power. On the 16th of the following October, he wrote that he thought he could get both the Ackerson and Howell matters arranged to suit Wright, but it

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Wright acted in a peculiar manner; and requesting
 that he should let him know how he should like to have it arranged.
 He said that he would not say to any one, and to let him hear from
 him on the 8th of April, 1870, he wrote that he
 had bought the property of Ackerson; that other parties
 had offered to buy the property, but he had bought it and
 he was requesting Wright to send him his check for \$500
 and to pay \$500 more on the 5th of the next May.
 He would make a deed to Wright, and the balance
 of \$500 in bond and mortgage on the property. He said
 nothing in this letter, or in any other, as to what he
 agreed to pay Ackerson. On the 13th of the same
 month he wrote acknowledging the receipt of \$600, in answer
 to Wright's letter, for the Ackerson property, and saying that he
 had not yet succeeded in arranging for the Howell farm, but
 would use all his skill in bringing about the purchase. On
 the 2d of May, Ackerson executed a conveyance of his prem-
 ises to Smith, expressing as the consideration the sum of
 \$1000, and on the 5th of the same month Wright paid to
 Smith \$400 more to make up the \$1000 named in his letter
 of the 8th of April.

Smith continued to write about the Howell farm, acknowl-
 edging in a letter of May 17th, the receipt of \$750, which
 Wright sent to be used in that purchase, and saying in one of
 July 11th: "I have just received my deed for the Howell
 property; got it this afternoon; all is safe now; thought best
 to let you know at once; you can complete your arrange-
 ments, as the property has changed hands; the obstacles are
 removed." He had before received for this purchase \$500
 from Wright, and on the 6th of August following \$750
 making in all \$2000 on account of that property. The deed
 for it from Howell to Smith expressed the consideration of
 \$7000. Some delay occurred in effecting the transfer from
 Smith to Wright, but the latter took possession shortly after
 the former got title, and Smith and wife subsequently con-
 veyed both properties to Wright by one conveyance, for the
 consideration of \$11,000, being the amount of the sum:

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named in the two deeds from Ackerson and Howell. This sum of \$11,000 was paid to Smith by Wright, as follows: \$3000 in previous cash payments, as already stated; \$2000 by assuming a mortgage of that amount on the Howell farm, and the balance, of \$6000, by bond and mortgage to Smith, payable in installments of \$2000 each, the first to be due May 5th, 1871.

Wright had not seen or in any way communicated with either Howell or Ackerson, but relied upon Smith to make the best terms he could, both as to prices and cash payments, and believed that he had done so, and that he had paid the sums named in the deeds, till in May, 1871, when he learned from Howell that instead of \$7000 for his farm, Smith had paid him but the value of \$5500, and none of it in cash. This led him to Ackerson, from whom he learned that instead of \$4000 for his land, Smith had paid him but \$1178, one-half of it in cash and the other half by a note payable in one year and eleven months. The consideration of \$5500 was made up by executing a mortgage on the premises for \$2000, and by conveying two lots in Newton which Smith had been seeking to sell. These lots he claims to have been worth \$4500 over and above their encumbrance, but it is proved that the lots were taken by Howell, through his agents, for \$3500, and it is further proved that the latter sum was a large price. The result of the whole is this: Smith received from Wright, in cash, \$3000, and paid out in cash \$589. He bought both properties for \$6678, and passed them over to Wright for \$11,000.

The object of the bill is to bring Smith to account, and to have the mortgage adjusted to what shall be found due. It calls for an answer without oath. The answer, though under oath, must therefore be treated as if it were not. But if it were evidence, its allegations so far as they deny the material matters of the bill would not be of the slightest avail. The evidence that Smith acted in a fiduciary capacity in making the purchases is superabundant and overwhelming. His letters, of which seventeen were produced, establish it beyond

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doubt. They carefully avoid any statements of what he was to pay, and are evidently drawn with studied care, evincing a purpose to make Wright believe he was buying for him as advantageously as he could, without saying so in terms. He received letters from Wright in large numbers, which upon the hearing he declined to produce, though requested and duly notified to do so. Their contents, as otherwise proved, are of the strongest character possible to show the relation of confidence existing between the parties. The whole conduct of Smith in originally proffering his services as a friend when informed by Wright of his wishes; imposing reticence on Ackerson and on Wright; causing fictitious considerations to be inserted in the deeds which he took; the fact that no arrangement or bargain was made, or is pretended to have been made, between Smith and Wright as to the price between them; and the manifest assumption on Wright's part that he was giving what Smith gave—an assumption which Smith knew Wright was acting on as certainly as he knew it to be false; are all in keeping with the letters and other facts of the case. It is true that the complainant was aware that in dealing with Howell, Smith was to turn in the two Newton lots, and was willing it should be done, but they were to be appraised at a just and reasonable price. He trusted implicitly in the defendant, because he had previously known him and done business with him while filling an honorable official position. But one view, I think, can be taken of this case. It is an instance of singular confidence on the one side and flagrant abuse of it on the other.

It is admitted in the answer that the complainant made known his wishes and plans to the defendant, and told him how far he would be ready to go as to prices, but it is denied that the defendant agreed to act as agent or to buy the premises in trust. He says he may have told the complainant, and he thinks he did, that he could buy for less money than complainant could, but he did not agree to act for him or incur any responsibility on his account; that the complainant was a stranger, of whose pecuniary means he had no assur-

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ance, and that he looked upon him as a sort of adventurer of doubtful responsibility; that as he had named the prices he was willing to pay, the defendant had made up his mind to ascertain from the owners what the lands could be obtained for, and concluded (if he could purchase them at prices which in his opinion it would do to hold them, and could turn in, in exchange, the town lots he held,) to obtain the same, and take his chances of selling to the complainant, and of getting payment enough to justify him in letting him into possession.

It is plain, from the answer itself, that the parties were not dealing at arm's length. But without holding that the answer alone shows the defendant to have been incapacitated from buying at all, except in trust for complainant, it is sufficient that whatever the answer alleges at variance with the gist of the bill, is thoroughly refuted by the defendant's letters, by his conduct, and by the testimony in the cause. From the evidence generally, as well as from his letters, he clearly appears to have understood that the true particulars of the transaction would not bear the light. His apparent mistake was in supposing it at all more defensible on legal grounds than on moral. That he was not formally constituted an agent, with authority to bind the complainant, or that his agreement to act for him was not formally made, are points which, if true, are of no sort of importance. Nor is it important that no agreement was made to compensate him for his services. It is sufficient that he accepted and held a situation of trust in reference to procuring the lands. Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others. The principle is general that a trustee, so far as the trust extends, can never be a purchaser of the property embraced under the trust without the consent of all the persons interested. The rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are

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engaged for that purpose, and paid for it. *Rankin v. Porter*, 7 *Watts* 387, 390; *For v. Mackreth*, 1 *Lead. Cas. in Eq.* 92; *Keech v. Sandford*, *Ibid.* 36.

It is superfluous to cite authorities for these familiar and salutary doctrines. They stand on the plainest dictates of conscience, and are essential to the maintenance of honorable business and of society among men. The transaction in this case is one not to be endured. It must be regarded as fraudulent, and be decreed to be reformed.

The complainant, before bringing his suit, made a tender to defendant of \$2000, in satisfaction of the mortgage. This amount was in considerable excess of what was thought to be due upon an accurate accounting, but the excess was volunteered to meet any claims for commissions or services. This tender was refused. The complainant now proffers in his bill to pay defendant all moneys expended by him in the purchase of the lands, and all interest accrued, together with a reasonable compensation (if it should be deemed equitable and just that he should be paid anything) for his services in making such purchases. In view of all the facts of the case, the defendant is entitled, in my judgment, to no allowance for commissions or services. The advantages he derived from a sale of his lands at a large price, and for cash, he has already secured. These he can keep, but no others can be properly allowed. The net value of the lots conveyed by him to Howell, over and above the encumbrance, must be allowed at \$3500. To this must be added the \$1178 which he paid, or is bound for, to Ackerson, together with his actual disbursements for conveyances, or other expenses for work done or materials furnished in the business. Interest to be also allowed upon the several items from their dates. He is to be charged with the sum of \$3000, paid him at different times by the complainant on account of the purchases, with interest from the delivery of the deed of conveyance from the defendant to Howell. The resulting balance will be the true amount due the defendant on complainant's mortgage. Upon pay-

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ment of this balance the mortgage and bond secured by it should be given up to be canceled.

In accordance with the above, I respectfully advise a decree, with costs to be taxed.

JONES vs. ADAMS and others.

1. The evidence in this case held not sufficient to show fraud and avoid certain assignments charged to be without consideration, and fraudulent and void as against the complainant.

2. But one of the mortgages assigned being for a greater amount than was given for it by the assignee, and the circumstances being suspicious as to the fairness of the transaction, the assignee was decreed to assign it to the complainant on his paying the amount of the securities given in exchange for it.

The cause was heard upon the pleadings and proofs, before the Vice-Chancellor.

Mr. Coult, for complainant.

Mr. Hamilton, for defendant.

THE VICE-CHANCELLOR.

The complainant is a judgment creditor of the defendant, John B. Adams, holding against him two judgments, amounting together to about \$1000, and has filed this bill to have the judgments satisfied out of two certain mortgages made to Adams, and now held by his assigns. The leading facts are these: Adams purchased, in 1866, a hotel property in Branchville, in the county of Sussex, and kept an inn there till January, 1870, when he sold and conveyed the premises and furniture for the sum of \$7500, being then indebted to complainant. Part of this price was settled by promissory notes, part by the assuming of encumbrances on the property, and

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the balance by a farm conveyed to Adams' wife, which was valued at \$5000, and encumbered for \$2000. In N 1870, Adams and wife conveyed the farm to Daniel H. J for \$5500, and for the whole of said price, after deducting said encumbrance, took a mortgage to Mrs. Adams for \$ embracing the premises conveyed, together with other owned by Rutan. On the 1st of April, 1870, Mrs. A assigned the mortgage to her daughter, Mary Adams about twenty-one years of age, who afterwards assigned her aunt, Miranda Wood. In the same month of N John B. Adams assigned to this daughter another mortgage for the sum of \$763, made to him a few months before. On the 15th of April following, the latter mortgage was assigned by the daughter to her mother. For the debts of Adams at the time of these assignments, suits were soon after brought and the judgments recovered, which the complainant seeks to enforce. The executions issued on them were returned unsatisfied, and Adams being examined under the statute, declared himself without means or property to

These assignments the complainant charges were made without consideration, or to defeat, delay, or hinder creditors and as against him are fraudulent and void. Two assignments are filed—one by Adams and wife, the other by Miranda Wood. They allege that Mrs. Adams was possessed in her own right of a separate estate, which was used by her husband in the purchase of the hotel; that although the title was taken to him, the property was equitably hers, and on the sale the resulting mortgage of \$3500 was executed to her in consideration of the moneys she had advanced; that Mary Adams, the daughter, had also property of her own, consisting of moneys given by her brother in his lifetime and at his death, which moneys she had loaned to her father and were in his hands when the hotel was sold; that she had also, for five or six years, worked for him in his business at the wages of \$10 per week; that the whole indebtedness so incurred amounted to about \$1500, in part payment of which she took the mortgage of \$763; that wishing to realize, in cash, the wh

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her claim, she arranged with her mother to take from her the mortgage of \$3500 and give back the mortgage of \$763, held by herself, intending to sell the larger mortgage, and after satisfying her own claim to give her mother the excess; that she disposed of it to her aunt for \$1000 less than its face, taking for it from her aunt another mortgage of \$1500 and a note for \$1000, to her mother, which note the aunt afterwards paid.

The circumstances and details of these general facts were thoroughly investigated at the hearing, the parties themselves, besides others, being witnesses. Upon carefully weighing the evidence, my conclusion is that neither of these mortgages can be held fraudulent and void, either as being without consideration, or as made or assigned to hinder and defeat creditors. Claims like those of the daughter and wife in this case, are well open to suspicion, but the evidence is too positive and clear to permit me to doubt that the daughter and mother did have moneys of their own not derived from the father, which they lent him and were equitably entitled to have repaid. In the case of the daughter, the sums of \$400 and \$600 are proved to have been given her by her brother, who died at the close of the war, being moneys received by him for bounties and pay. These moneys were lent to the father, and in part payment the mortgage of \$763 was assigned to her. This mortgage should not be disturbed. In regard to the other, there is more room to doubt. It is sufficiently proved that Mrs. Adams had separate means; that she obtained them from her father and brothers; that before the purchase of the hotel her means had been invested in her own name in lands and securities which were subsequently changed into money, and taken by her husband and agreed to be refunded or secured to her separate use. There is no ground to question that her claim, under the circumstances, was just, but there is much ground to question the amount of it, and to question also the insistence that the object of the assignment to her was simply to secure to her the actual sum due. There is uncertainty and vagueness as to what this

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sum really was. It was certainly less than \$3500, the amount of the mortgage, and I am satisfied was not more than \$2500, the amount for which it was afterwards assigned to her sister, Mrs. Wood. It was made for the whole price of the farm, after deducting the encumbrance, and was payable in six years, and for these reasons is earnestly insisted to have been worth less than its face. These reasons are relied on to explain and to justify the large discount allowed on it when assigned to Mrs. Wood, and to show that its fair value did not exceed what was really due Mrs. Adams. But this insistence is refuted by the fact that other lands were included in it and worth enough to make the mortgage secure. The circumstances attending its execution and transfer excite suspicion and distrust. They savor much of a purpose in Adams to keep his property from the reach of his creditors, as well as to secure to his wife her separate estate. The evidence justifies the belief that upon the sale of the farm there was property enough, out of which both she and the creditors might have been paid or secured. But whether this be so or not, there was nothing to justify the assignment of the mortgage to her in excess of her claim. The general aspect of the transaction is unfavorable and dubious. But I do not feel warranted in pronouncing it on her part a fraud, and directing the mortgage, on that ground, to be entirely given up. In her hands and in the hands of Mrs. Wood, the price or consideration of it is inadequate indeed, but, *pro tanto*, it seems to me good. Consistently with the evidence in the cause, and with the equities of parties, it may be treated as a security to Mrs. Adams, but not as her absolute property. The \$2500 paid for it by Mrs. Wood is probably nearly equal to, certainly not less, than what is shown by the proofs to have been due to Mrs. Adams. The assignment to Mrs. Wood was undoubtedly procured at the suggestion and by the management of Adams himself; and whatever her information or intentions may have been, all the circumstances compel the belief that his object was the more effectually to protect the mortgage from liability for his debts. The trans-

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fer was made on the 10th of August. One of the judgments was obtained on the 31st of that month, and the other on the 8th of September. Both suits were pending when the transfer was made. The reasons given for assigning it are specious, and are contradicted by subsequent acts. The daughter says it was done to enable her to raise money to go into business. But she took a mortgage for it of \$1500 to herself, and a note for \$1000 to her mother. The mortgage was not turned into money and is held by her yet. That Mrs. Wood was not fully apprised of the object in inducing her to go into the transaction, is probably true. She is entitled, on this ground, to be secured for her advances, but no more. She did as she was asked, did not look at the property and gave what was named to her, following, evidently, their lead. I am entirely satisfied, from the evidence as given at the hearing, that this is the true view of her case.

The conclusion I have reached is, that the complainant is entitled to what remains of this mortgage after paying Mrs. Wood. She must be decreed to assign it to him on payment of the principal and interest of the mortgage, and the note which she gave in exchange for it. A reference should be made to ascertain this amount. The judgments of the complainant will somewhat exceed the surplus or balance of the mortgage after paying Mrs. Wood; but such balance, when collateral, is to be credited on his claim. This result is in accordance with the settled methods and principles of equity, and with the action of this court in similar cases. *Beeckman v. Montgomery*, 1 *McCarter* 106; *Demarest v. Terhune*, 3 *C. E. Green* 532; *Tantum v. Green*, 6 *C. E. Green* 364.

In *Boyd v. Dunlap*, 1 *Johns. Ch.* 478, it was said by Chancellor Kent, that where a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of the consideration and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as security for the sum actually paid.

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In the present case, I think a discrimination should be made as to costs, and will advise that the decree made in pursuance of the above be with costs against Adams, but without costs as to the defendant, Mrs. Wood.

RUCKMAN vs. RANSOM.

1. If arbitrators refer any point to judicial inquiry, by spreading it on the face of the award, and they mistake the law in a palpable and material point, their award will be set aside. But, in general, being the chosen judges of the parties, they are judges of the law as well as of the facts, and are not bound to award on mere dry principles of law, but may do so according to the principles of equity and good conscience.

2. Courts will not compel arbitrators to disclose the grounds of their judgment, nor disturb their decisions when made, except upon very cogent reasons.

The motion to dissolve was argued upon bill and answer before the Vice-Chancellor.

Mr. J. F. McGee and *Mr. Ransom*, for motion.

Mr. Dixon, contra.

THE VICE-CHANCELLOR.

Upon the bill in this cause an injunction issued, restraining the defendant from the collection of a judgment in the Supreme Court on an award made by Joel Parker, arbitrator. The award was for \$5011.13, to be paid Stephen B. Ransom by Elisha Ruckman, together with \$63, one-half the arbitration expenses and fees. The matters in difference were professional services by Ransom as attorney and counsel, through several years, in numerous suits in the various courts, civil and criminal, of this state, and for his disbursements therein. Ruckman did not attend upon the arbitrator, though duly notified. In the action at law on the award, various de-

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fences were raised and overruled, judgment being rendered against him in the Supreme Court and affirmed in the Court of Errors: one of these defences being that the arbitrator had exceeded his jurisdiction in making the award; that matters were embraced in it occurring after the submission and not within his powers. This did not appear on the award itself, but was attempted to be shown by parol. This attempt was overruled, on the ground that the error complained of could be remedied in equity only, and not at law.

The bill seeks this relief: and upon answer filed and motion to dissolve, the points made by complainant relate to certain taxed bills of costs, alleged to have been included in the award by the arbitrator under a mistake of law and in excess of jurisdiction. Eight bills of costs had been taxed against Ruckman in the Oyer and Terminer of Bergen, and applications being made by Ransom, his attorney, for re-taxation, the present controverted bills were taxed in these several applications. The submission was made August 30th, 1869. The applications were made prior to that date, but the costs were not taxed till November 1st, 1869. Copies of them were served on Ruckman on the 15th, and the hearing before the arbitrator begun on the 30th of that month. The award was made in January following, and in April following the Court of Oyer and Terminer, on Ruckman's application, held the bills to be unauthorized by law.

The insistment is, that these bills were allowed by the arbitrator under the mistaken idea that they were lawful; and though the applications were made and the professional services rendered before the submission, yet the bills themselves were subsequently taxed, and the items in them of taxation fees being necessarily later than the submission, could not be considered by the arbitrator or allowed in the award.

The answer admits the offering of the bills, but asserts that the services and disbursements covered by them were shown by other proofs to have been rendered and made. That the defendant does not know and has not been informed, and cannot tell to what extent the arbitrator allowed them, or whether

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as a legal claim or not. That the claims which he made amounted in all to \$5500, or thereabouts, nearly \$500 more than the amount of the award. The particulars of these claims are set forth in the answer, which, upon these points and upon the evidence that was produced at the hearing, are sufficiently responsive to the bill.

The doctrine is, that if arbitrators refer any point to judicial inquiry by spreading it on the face of the award, and they mistake the law in a palpable and material point, their award will be set aside. But, in general, being the chosen judges of the parties, they are judges of the law as well as of the facts, and are not bound to award on mere dry principles of law, but may do so according to the principles of equity and good conscience. Nor will courts compel them to disclose the grounds of their judgment, nor disturb their decisions when made, except upon very cogent reasons. 2 *Story's Eq.*, §§ 1454, 1455, 1457.

What the arbitrator thought or did in regard to these bills, does not appear. The defendant has disclosed what claims he produced, and among them the eight bills in question. Whether the arbitrator thought them lawfully taxed and allowed them in full or in part, or whether he relied upon the fact that the services had been given and the moneys expended, and awarded what he considered equitable and just, does not appear, nor is he bound to declare. It is not permissible to impute to him any mistake of law or any intention to base his conclusion on strictly legal grounds. But he had a right also to adjudge upon the legality of the bills, and his judgment, if wrong, would not vitiate the award.

The objections to the bond and to the affidavit to the answer, referred to at the argument, were understood to be waived, or to be open to correction, as further proceedings might require.

Upon the pleadings and affidavits the injunction must be dissolved.

Trusdell v. Jones.

TRUSDELL vs. JONES and others.

1. An agreement to extend the time of payment of a mortgage, in consideration of a note for \$500, is invalid, and an assignee of the mortgage, who had no notice of such agreement, and took the mortgage as then due and payable, is entitled at once, and before the extended time has elapsed, to a decree for the amount of the mortgage, less the value of the note.

2. But the mortgagee, having covenanted with the assignee that a certain sum was due upon the bond, will be allowed to avoid the credit by giving up the note; otherwise the present worth of the note must be endorsed as a credit on the bond.

This cause was argued upon the pleadings and evidence; before the Vice-Chancellor.

• *Mr. Oscar Keen*, for complainant.

• The mortgage sought to be foreclosed, by its terms was due April 1st, 1871. Two days afterwards the defendant, Jones, gave to the then holder of the mortgage his note for \$500, payable in fifteen months, and Meeker, who was the owner of the mortgage, agreed to extend the time of its payment for one year, and soon after assigned it to complainant, without notice of any such agreement.

The only question is as to the effect of the agreement. We contend that there was no legal consideration for the agreement to extend. It was but a promise to pay a portion of the whole debt then already due. See supplement to the usury act, *Nix. Dig.* 439, § 1.

This has received a judicial construction from the Supreme Court. *Nightingale v. Meginnis*, 5 *Vroom* 461.

The act applies to "cases of suits at law or in equity."

The note is void for want of consideration, and in any event the amount for which it was given can only be deducted from the sum that is due.

See also the following cases: *Vilas v. Jones*, 1 *Comstock* 274; *Tudor v. Goodhue*, 1 *B. Monroe L. and Eq. R.* 322;

Trusdell v. Jones.

Kenningham v. Bedford, *Ib.* 325; *Reynolds v. Ward*, 5 *Wend.* 501; *Burge on Suretyship* 203-4; *Pabodie v. King*, 12 *Johns. R.* 426.

Mr. G. W. Cummings, for defendant.

THE VICE-CHANCELLOR.

The bill is filed to foreclose a mortgage dated April 1st, 1869, made by Henry A. Jones and wife to Samuel A. Meeker, one of the defendants, for \$14,000; payable on the 1st of April, 1871. Soon after the mortgage fell due a parol agreement was made between Meeker and Jones for the extension of the time of payment of the principal. It was agreed that the principal should not be payable till April 1st, 1872, and, as the consideration therefor, Meeker took from Jones his note, dated April 3d, 1871, for \$500, payable in fifteen months. On or about the 22d of the following July, Meeker assigned the mortgage to Trusdell, the complainant, who had no notice of the agreement, and took the mortgage as then due and payable. To his present bill Jones and wife have answered, alleging the above agreement, and insisting that by virtue of it the mortgage debt is not yet due. There is no dispute about the facts, the only question being as to the validity and effect of the agreement.

This question I understand to be entirely settled by the judgment of the Supreme Court, in *Nightingale v. McGinnis*, 5 *Vroom* 461. A parol agreement had there been made between the holder and maker of a matured and protested note for the delay of one month. In addition to the legal interest, \$10 had been paid by the debtor in consideration of the delay. This agreement was adjudged to be invalid, as without consideration, and the money paid treated as a payment on the note, under the statute against usury, approved April 12th, 1864.

The present case is within the scope and reason of that decision, and must be governed by it. The defendant, Jones, is entitled to have the note surrendered to him, or to have a

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credit on the bond for the amount of the note or its present worth. The purchaser of a mortgage takes it subject to the equities belonging to it when assigned. The equity of Jones being to have the note taken as a credit or payment on the debt, or given up as void, the complainant assumes the place of Meeker, and takes the bond and mortgage as they were chargeable in his hands.

The defendant, Meeker, having covenanted in the assignment deed to Trusdell that a certain sum was due upon the bond, should be allowed to avoid the credit on the same by giving up the note. Upon the reference to the master the defendant, Meeker, being summoned, may show that the note has been surrendered; otherwise its present worth must be endorsed as a credit on the bond.

I respectfully advise a decree in pursuance of the above.

BLEECKER vs. HENNION.

1. The widow's quarantine, or right of possession, under the second section of the act relative to dower (*Nix. Dig.*, 4th ed., 250,) is an incident only to her dower, belonging to that right, and inseparable from it. It is a privilege preceding, but not in any wise preventing or impeding the assignment or disposal of her dower.

2. This privilege is not an estate within the meaning of the supplement respecting partition, approved March 18th, 1858, and does not make the widow a particular tenant within the meaning of that supplement, which must be construed in connection with the supplement approved February 12th, 1855.

3. Under the facts of this case the premises directed to be sold subject to the widow's dower.

This cause was heard upon the pleadings and proofs, before the Vice-Chancellor.

Mr. F. A. Demott, for complainant.

Mr. G. W. Forsyth, for defendants.

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THE VICE-CHANCELLOR.

The complainant's bill is filed for partition of the homestead of which his grandfather, William N. Hennion, died seized. The homestead consists of the mansion-house and two acres of land, situate in Parsippany, in the county of Morris. Hennion died in 1866, and his widow has since remained in possession of the premises, her dower not having been assigned. The complainant is the owner of the undivided one-sixth part, which would have descended to his mother, a daughter of Hennion, had she survived her father. The remaining five-sixths belong to the five surviving children of Hennion.

The bill alleges that the premises cannot be divided among the six owners without great prejudice to their interests, and prays that a sale be ordered and the proceeds divided.

The answer is by the widow and four of the children. The four children say that they and their brother, who has not joined in the answer, are willing the premises should be sold, but wish them sold subject to, and not discharged of, the widow's dower. They say that such dower can be assigned by metes and bounds, and that under the circumstances of the case it ought to be done.

At the argument the question was discussed whether, under the possession of the premises by the widow before dower assigned, the bill for partition was properly filed. It was insisted, in behalf of the defendants, that the right of possession conferred by the second section of the act relative to dower (*Nix. Dig.*, 4th ed., 250,) gave her an estate, and made her a particular tenant within the meaning of the supplement concerning partition, approved March 18th, 1858, (*Nix. Dig.* 673), by which supplement the consent of the particular tenant is required before partition or sale can be made of lands, wherein an estate for life or lives, or other less estate of the particular tenant exists.

I am of opinion that this insistment cannot be maintained. This supplement must be construed in connection with the previous supplement, approved February 12th, 1855, (*Nix.*

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Dig. 672,) whereby the estate of any tenant in dower or by curtesy is expressly named and authorized under certain conditions to be directed to be sold. The widow's possession or quarantine is an incident only to her dower, belonging to that right and inseparable from it. It is a privilege preceding, but in no wise preventing or impeding the assignment or disposal of dower. So regarded, it necessarily appertains to the estate specified in the supplement of 1855, and cannot, therefore, be included in or attached to any of those enumerated in the supplement of 1858. This construction harmonizes the provisions of the two supplements, which, under a different construction, would be discordant and conflicting. Besides this, a sale only, and not a partition, is contemplated by the earlier supplement. The bill and the answer assume that only a sale can be made. The question whether such sale should include the widow's interest, however answered, is independent of the fact whether dower has or has not been assigned. The act of 1855 is applicable to both of these conditions, and proceeds upon the ground that in the one case an assignment is superfluous, and in the other that it can be made after as well as previous to a sale.

Should the premises be sold in this case, clear of or subject to the rights of the widow? By the language of the act, "it shall be lawful for the court to consider and determine, under all the circumstances of the case, having regard to the interests of all the parties, whether such estate ought to be excepted from such sale, or whether the same should be sold, and to order and decree accordingly." *Nix. Dig. 672.*

The widow is seventy-five years of age. Her health is precarious and infirm. During most of her married life she has lived on the premises. She is extremely unwilling to leave them to find elsewhere a home. The answer avers, and the averment is supported by proof, that such a change would be prejudicial to her health. The premises are such that a suitable part could be set off for her occupancy. The daughters who live with her, and whose attentions she needs, can more advantageously, and with less expense to themselves

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and to her, occupy such a part, than provide elsewhere a home. The pecuniary interests, as well as the general welfare of the daughters and mother, will be promoted by excepting the mother's interest from the sale. It does not appear that the complainant's interest will be thereby impaired. Under all the circumstances of the case, and having regard to the interests of all the parties, I am of opinion, and do advise, that the premises should be sold, and that the rights therein of the widow should be excepted from the sale.

COULT vs. McCARTY.

1. Where an illegal reservation has been made by the mortgagee, and the mortgagor afterwards effected a new loan by the assignment of the mortgage, representing it to be good, he is precluded from setting up the original usury against the assignee and those claiming under him.

2. Usury in the contract between the mortgagor and the assignee being proved, the amount of bonus paid directed to be deducted from the principal of the mortgage, and a decree for the balance allowed, without costs, and without interest on the balance of principal from the time interest was last paid.


This cause was heard before the Vice-Chancellor, upon the pleadings and the oral evidence of witnesses.

Mr. Coult, for complainant.

Mr. Ludlow McCarter, for defendant.

THE VICE-CHANCELLOR.

The defence to the foreclosure suit is usury. The mortgage was for \$1000, dated March 30th, 1867, made by the defendant, McCarty, to Walker, and by him assigned October 6th, 1868, to Pinkney, and by him assigned June 24th, 1870, to Conkle, and by him to the complainant.

The evidence shows that when the mortgage was given, 

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bonus of \$75 was paid by the defendant to the mortgagee. At the expiration of the year, when the mortgage came due, a further bonus of \$70 was paid for an extension of six months.

The assignment to Pinkney was in pursuance of an agreement between him and McCarty for a loan of \$1000 for one year, for a bonus of \$50 beyond lawful interest. This bonus was paid, together with \$18.50 discount, by McCarty, on Pinkney's note, and Pinkney took the mortgage, which was afterwards assigned, as above, to the complainant, who is an innocent holder for value.

The question is what amount the complainant is entitled to recover. Pinkney testifies that when he made the loan he had no knowledge of the previous usury, and took the assignment on the faith of McCarty's assurances that the mortgage was all right, and good for its face. McCarty denies this; but I am satisfied from the evidence that he is in error, and that Pinkney's story is true. Having procured the assignment and loan on this representation, the defendant is precluded from setting up the original usurious reservation by Walker, against Pinkney and his assigns. He is entitled to be allowed the bonus of \$68.50 paid to Pinkney, and to that extent the defence must prevail. The interest on the mortgage was paid in full to October 13th, 1869. From that date no interest can be recovered, and the \$68.50 bonus must be credited on the bond. A decree will be advised for \$931.50, without costs.

MURRAY vs. ELSTON.

Motion to dissolve injunction not granted, though the equities of the bill were denied by the answer, the circumstances of the case being such as to withdraw it from the operation of the general rule. Injunction continued upon terms.

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The argument was before the Vice-Chancellor, on motion to dissolve injunction upon answer filed.

Mr. Dixon, for motion.

Mr. A. Zabriskie, contra.

THE VICE-CHANCELLOR.

Murray and Elston, for several years partners in business, dissolved their connection in January, 1868, and were soon after involved in disputes and litigation respecting the partnership property and accounts. On the 17th of March, 1870, they made an amicable settlement, and embodied its terms in a writing of that date.

Before the dissolution a foreclosure decree on two mortgages had been obtained against Murray, and his mortgaged premises were about to be sold. To prevent the sale the mortgages and decree were, at Murray's request, assigned by their holder to Elston for the sum of \$2940.09, which amount was paid by the check of the firm. In the agreement of March 17th, Murray recognized the decree and mortgages so assigned to Elston, as his separate individual property, and his title to them as free from all question. An alias execution on the decree was afterwards issued to the sheriff of Hudson, and the property duly advertised, when the complainant filed his bill, and an injunction was allowed restraining the sale.

The bill alleges that the agreement of the 17th of March was procured by Elston through fraudulent representations; that while the partnership existed he had charge of the books and accounts of the firm, and for some of the debts of the firm took securities in his own name, and, among others, took from one Smith, who was indebted to the firm in the sum of \$6750, a mortgage for \$4000 on real estate in New Jersey, and a conveyance of five lots in Brooklyn for the balance; that the entry by Elston in the books of the firm was to the effect that the amount which he realized from

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the mortgage and lots was only \$6750, or the amount of Smith's debt, while he actually realized from the same the sum of \$9530; that the March agreement was on the faith of the truth of that entry, and that the complainant had but lately learned it to be false; that being false, the agreement is invalid, and the mortgages and decree are the property of the firm, and not of Elston.

The bill asks that the March agreement be decreed to be void, a receiver appointed, and a new accounting and settlement of the partnership affairs. The answer denies, fully and explicitly, the equities of the bill. Under the general rule in such cases, the injunction should be dissolved. But this rule is subject to exceptions, and does not necessarily prevail where, by continuing the injunction, the ends of justice will be better subserved. The motion to dissolve in such instances has been often denied by this court, in the exercise of its appropriate discretion, having regard to the circumstances of the case, and the effect which a dissolution would have upon the relative situation of the parties in the further prosecution of the suit. *Chetwood v. Brittan*, 1 *Green's Ch.* 439; *Fleischman v. Young*, 1 *Stockt.* 620; *Stotesbury v. Vail*, 2 *Beas.* 390.

In addition to the denials which the answer makes of the material allegations of the bill, as to the mortgage and lots taken from Smith, it was urged upon the argument that the separate and absolute title of Elston to the decree, was shown by the terms of the March agreement to have been good and undisputed before that agreement was made, and that therefore Elston's title to it could not be impaired if the agreement itself should be set aside as fraudulent and void. The terms of the agreement referred to in support of this view are these: "Patrick Murray and David Elston, with a view to a full and final settlement, and the recognition of existing rights, mutually covenant and agree to and with each other as follows." Because the title of Elston to the decree is then recognized as valid and unquestionable, it is argued that it had not been previously qualified or questioned. I should

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not be willing to rely on such an inference. A contrary deduction seems to me quite as logical and fair. Elston's absolute right to the decree, and his right to the Smith mortgage and lots, so far as the pleadings and affidavits now disclose, appear to be essentially the same.

I have had much doubt as to the propriety of withdrawing this case from the operation of the general rule. The statements and denials of the answer are thorough and direct. The answer seems entitled to as much credit as the bill. But still, upon the whole, my judgment is that the temporary injunction should be further retained. The defendant resides out of the state. There are no other assets of the firm within the jurisdiction of the court. If the sale should go on and the proceeds be paid over, the final decree, if favorable to the complainant, would be a barren success.

The answer was not filed for more than four months after the injunction, and the complainant has put in his replication and is proceeding with his suit. He alleges the premises to be a large security for all that is due, or can become due, on the decree during any probable continuance of the suit, and tenders himself willing to pay the moneys into court, if that should be deemed more secure. The answer suggests doubts as to the sufficiency of the premises to satisfy the execution. Under these circumstances the present application should, I think, be disposed of by directing the complainant (if the defendant shall elect to have the order so made,) to pay the sum due on the execution for the amount of decree, interest, and costs into court within fifteen days, and to bring the cause to final hearing within thirty days from the first day of the term, and in default of so doing, the injunction to be dissolved. The costs of this motion to abide the event of the suit.

Such an order will be advised.

CASES

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

MAY TERM, 1872.

MORRIS *vs.* TAYLOR.

1. Where the defence to a bill for foreclosure is that the amount for which the mortgage was given was not advanced, and the court, upon the evidence, adjudge the defence of usury is not sustained, and refer it to a master to compute the amount due upon the mortgage, evidence to show that the amount had not been advanced, is inadmissible.

2. When a cause is set down for hearing on the first day of the term, and the defendant gives notice of hearing of exceptions to the master's report at a later day in the term, but enters no rule to set down the hearing, and the exceptions are not placed on the calendar, and upon the call of the calendar the complainant's counsel tenders himself ready to move the cause, but cannot proceed until the exceptions are disposed of, the complainant is entitled to move at once at the same term, upon the overruling of the exceptions, for final decree.

3. Exceptions must be set down for hearing, and placed upon the calendar like the hearing of other causes, and notice thereof must be served fifteen days before the hearing, or the report will be confirmed as a matter of course.

4. The order setting down the exceptions for argument must be both entered and served before the expiration of the time in the rule *nisi*, or the report will be confirmed. Either party may set them down for argument.

5. When the merits of the cause have been determined in the interlocutory decree and the reference is to compute amounts due, or to settle facts, and the master's report is confirmed upon exceptions taken, nothing further is to be done upon the cause being moved, when set down for further

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directions or final decree, than to decree the relief adjudged on the interlocutory decree for the amounts, or upon the facts settled by the master's report thus confirmed. The merits of the case determined by the interlocutory decree cannot be again gone into.

6. In case of a plain mistake of the master evident upon the face of the account, which was not included in the exceptions or considered in the hearing of them, the court will, in its discretion, correct the mistake, or defer the final decree until it can be examined into and corrected. But no such mistake is pointed out in this case.

The argument was had upon exceptions to the master's report, and the cause set down for hearing on further directions upon the master's report.

Mr. J. Wilson, for complainant.

Mr. W. H. Vredenburg, for defendant.

THE CHANCELLOR.

The bill is for the foreclosure of two mortgages. The answer admits the mortgages, but sets up that the complainant did not advance to the defendant, on either mortgage, the amount for which it was given, and that the mortgages were given upon an agreement to advance the sums paid, upon giving the mortgages respectively, for greater amounts. The answer insists that these bonds and mortgages are usurious, and that the complainant should only recover the amounts actually advanced, without interest or costs.

The cause was heard before the Vice-Chancellor, who, upon hearing the evidence, being of opinion that the defence of usury was not sustained, advised a decree adjudging that it was not sustained, and referring it to a master to compute the amount due upon the mortgage, with directions not to allow a credit of \$180, endorsed on one of the bonds.

The Court of Errors, upon appeal, affirmed the decree advised by the Vice-Chancellor. The decision in both courts was upon the ground that the evidence did not sufficiently

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sustain the allegation that the amounts for which the mortgages were given had not been advanced.

The master, on the reference, refused to hear evidence offered by the defendant to show that these amounts had not been advanced. To this the defendant filed exceptions. The cause was set down for hearing on the first day of the term by the complainant, and the defendant gave notice of hearing the exceptions on Friday of the second week of the term, but entered no rule to set down the hearing, and the exceptions were, therefore, not placed upon the calendar for the term.

Upon the call of the calendar, the complainant's counsel tendered himself ready to move the cause, but could not proceed until the exceptions were disposed of.

The decision in this court and the Court of Errors must be conclusive as to the validity of those mortgages for the whole amount secured by them. The answer expressly alleged that the whole amount was not advanced. If this is treated only as part of the defence of usury, and not as a distinct defence to part of the mortgage debt, then, like any other defence, it is of no avail because not set up. And the master could not inquire into the validity of a defence not set up in the answer, any more than he could inquire into usury or fraud in the consideration, in a cause wherein the only defence set up was infancy, and not sustained at the hearing. But if the allegations that part of the consideration was not advanced are set up so as to form a defence on that ground, without regard to the usurious interest, (as I think they are,) they must be regarded as settled by the decision here in this court and in the Court of Errors. The reasoning in the opinions in both courts, shows that the whole question turned upon the sufficiency of the proof to establish the fact that only part of the consideration was advanced. In either case, the burden of proof was on the defendant. The holder of a bond or mortgage is not bound to prove satisfactorily, or at all, that the money was advanced. The instruments are proof of that. And it should require as clear proof to disturb this evidence when founded on solemn instruments under seal, as to prove

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usury. And all the observations of the Vice-Chancellor on that matter will apply as well to proof of want of consideration.

The order referring it to the master to compute the amount due upon the bond and mortgage, is, in effect, an adjudication that they are valid securities for the amounts for which they are given. That order might, and perhaps should, have been expressly adjudged. If the defence of want of consideration was, as I have taken for granted, set up in the answer, it was the duty of the court to have considered and determined it. A matter put in issue by the pleading must be determined by the court, and cannot be referred to a master, unless for the disability of the Chancellor the whole cause is so referred, and then the master determines it, sitting as and for the Chancellor.

I had at first some doubt whether the complainant, having suffered the cause to be passed on the first call, could, without having it again set down, move it at this term for final decree. But that doubt has been overcome, both by the express ruling of Chancellor Halsted in *Brundage v. Goodfellow*, 4 Halst. Ch. 513, and by the settled rules of practice in case of exceptions to masters' reports on reference upon interlocutory decree.

The statutes of this state and the rules of this court, have little in them upon the question here. The ninety-fourth rule requires all causes to be *set down* for hearing on the first day of the term, if practicable, and in all cases before the twentieth day; and that a notice shall be furnished to the clerk six days before the term, that it may be entered on the calendar. The ninety-fifth rule requires that notice of bringing causes to a hearing, including exceptions to a master's report, shall be served fifteen days before such hearing argument. This shows that such exceptions must be set down for hearing and placed upon the calendar, like the bringing of other causes.

The English practice requires this, and that, when

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altered by statute, rule of court, or practice, is the law of this court.

The order setting down the exceptions for argument must be both entered and served before the expiration of the time in the rule *nisi*, or the report will be confirmed. Either party may set them down for argument. 2 *Daniell's Ch. Pr.* 1310, 1316; 1 *Newland's Ch. Pr.* 345; *Gildart v. Moss*, 4 *Ves.* 617.

In this state the English practice of setting down causes for hearing by rule entered, or supposed to be entered, for that purpose, has always been continued. The subpœna to hear judgment was abolished by the chancery practice act of 1799, § 56, (*Nix. Dig.* 115, § 76,) and notice of hearing substituted in its place.

Exceptions to a master's report must, then, be regularly set down for hearing and entered on the calendar, or the report will be confirmed as a matter of course. In this case, as the argument of the exceptions was allowed to come on without objection on that account, no advantage can be taken of this default, but the case is in the same position as if the exceptions had been regularly set down for hearing and overruled.

As the counsel of the complainant answered to the case upon the call of the calendar, ready to proceed as soon as the exceptions were disposed of, there was no default, and he is entitled to move for final decree at the present term. When the merits of the cause have been determined in the interlocutory decree, and the reference is to compute amounts due or to settle facts, and the master's report is confirmed upon exceptions taken, nothing further is to be done upon the cause being moved, when set down for further directions or final decree, than to decree the relief adjudged on the interlocutory decree for the amounts, or upon the facts settled by the master's report thus confirmed. The merits of the case determined by the interlocutory decree cannot be again gone into; they were once determined. The correctness of the master's account cannot be reconsidered; that must be examined upon

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the exceptions, which, once overruled, will not be considered on this motion.

In case of a plain mistake of the master, evident upon the face of the account, which was not included in the exceptions or considered in the hearing of them, the court would, in its discretion, correct the mistake, or defer the final decree until it should be examined into and corrected. No such mistake is here pointed out. The matter urged as a mistake is not that of the master, but if it exists, of the Vice-Chancellor and Court of Errors in the interlocutory decree.

 MCKNIGHT'S EXECUTORS *vs.* WALSH.

1. A direction by a testator that his executors invest \$25,000 of the estate and pay the interest thereof to his daughter during her life, and after her decease that the executors appropriate and expend the legal interest of said sum towards the proper maintenance and education of the daughter's child or children, authorizes only so much of the income to be expended as will maintain and educate her child in a manner proper or suitable to his condition or fortune. Under such direction, no part of the income could be appropriated to the support of the father without an order.

2. In general, a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court, based upon his inability to support them properly.

3. Nor is he entitled to the whole of the income of his child's estate, on the ground that it is necessary to enable him to support and maintain an establishment suitable for such child as a member of his family. Where the executor has paid over the whole income, in such case, to the father, such payment will not be confirmed, even if made in good faith.

4. Where a trustee has invested the trust fund in business, trade, or speculation, he can be called upon to account for the profits made by it, or at the option of the *cestui que trust*, to pay interest at the highest rates, and with yearly rests, or compounded. But it is only in cases of gross misconduct; never for a mere neglect of duty, as for not investing the trust funds, but letting them lie idle.

5. A trustee cannot be called to account for the profits of a business in

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which the fund was originally invested lawfully, merely because he neglected to withdraw it from that business, *where, however, it was not*

6. But where a part of the trust fund consists of moneys advanced to the trustee, and the trustee, in violation of the testator's directions, neglects to invest, and continues to use the money in his own business, and where, by not paying in his debt, he is enabled to keep certain railroad shares, of which he actually received the income half yearly, the trustee will be charged with annual rests and compound interest. The excess on the half yearly interest in this case being too small for investment, the trustee will only be held for the yearly rests.

7. Where a trustee, in violation of the trust, fails to invest the fund, and uses it in his own business, he is not entitled to commissions.

8. Where the executor was a debtor of the testator, and a trust fund established by the testator consists of the debt, which the executor has never paid into the estate, but upon which he paid the interest as it accrued, he is not entitled to commissions.

9. An executor or his representative is not entitled to commissions on any part of the assets not collected.

10. The principal of a specific sum bequeathed as a trust fund is not liable to commissions; they must come out of the residue of the estate.

11. The executor, by agreement with the infant's father, having kept \$1000 as commissions, the amount must be included in the balance on which compound interest is to be computed.

Argued on final hearing upon bill, answer, and proofs.

Mr. Browning and *Mr. Williamson*, for complainants.

Mr. Pitney and *Mr. Beasley*, for defendant.

THE CHANCELLOR.

The bill in this cause is exhibited by the executors of John L. McKnight, deceased, for the settlement of the account of their testator, as executor of the last will of Edward R. McCall, deceased, and as trustee under that will. Edward R. McCall, of Bordentown, died July 30th, 1853. By his will, of which he made John L. McKnight, his brother-in-law, executor, he directed his executor to invest \$25,000 of the estate in some safe security, in his own name, as trustee for his daughter, Sarah W. McCall, in trust, to pay her the interest for her own separate use during her life, and after

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her decease for any child or children of his daughter during minority ; he, the executor, appropriating and expending the legal interest of said sum toward the proper maintenance and education of such child or children, and to pay the principal to them on their attaining twenty-one. The residue of his estate he gave to his only child, Sarah W. McCall.

McKnight proved the will and accepted the trust. He paid the debts, and paid the residue of the estate above the \$25,000 and debts and expenses, to the daughter of testator. But he never made or exhibited an inventory or any account of the estate. Sarah, the daughter, married Joseph C. Walsh, October 3d, 1853. She gave birth to a son, Robert C. Walsh, the defendant, June 3d, 1855, and died on the 10th of that month.

Walsh, on the 4th of January, 1858, married Anna Wood, and died on the 13th of June, 1862. Mrs. Anna Walsh is defendant, as guardian of her step-son, Robert C. Walsh.

McKnight, at the death of E. R. McCall, was indebted to him in the sum of \$21,200, which McCall had loaned to him on his bond, then due, and in \$671 interest accrued upon it, and also in the sum of \$2000, money which McCall had put in his hands to purchase stocks, which had not been bought. This indebtedness amounted in the whole to \$23,871. This amount was never paid into the estate, but was retained by McKnight, together with enough cash of the estate to make the sum of \$25,000. The stocks and other securities of the estate were handed to the daughter without being changed. The cash in bank, and the proceeds of sales of chattels, to a small amount, were more than sufficient for debts and expenses, and the balance was paid to her as part of the residue.

The interest of the trust fund, during the life of Mrs. Walsh, was paid to her or her husband. But the principal of that fund was never invested on any security by McKnight, who canceled the bond and retained the fund.

Soon after his marriage Mr. Walsh suggested the necessity of investing this trust fund as directed by the will. McKnight

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proposed to retain it in his hands for his own use. He owned a large amount of stock of the Camden and Amboy Railroad Company, and of other corporations; he owned a controlling amount of the stock of the Bordentown Bank, and controlled the bank, and owned largely of other stocks; he was also engaged in other enterprises that required capital, and as shown by the cashier, was a frequent borrower at the bank. The money he had got of McCall was, without doubt, properly used in some of these matters, and it evidently was advantageous to him to retain it. He urged its retention, and showed Walsh how it would be of advantage to him to let it remain. It would be liable to no state tax while in his hands, and he intimated that if it remained he would charge no commissions, and showed the disadvantages and expenses that would occur on the taking of security. Walsh had procured the opinion of that eminent lawyer, George Wood, esq., a native of Burlington, but then of New York, showing that it was the duty of the trustee to separate this fund from his own estate, and place it on good security. McKnight, however, prevailed, and induced Mr. and Mrs. Walsh to allow him to retain this fund, he having deposited with the cashier of his bank, as collateral security, two hundred and fifty shares of its capital stock, with power to transfer them to his name as trustee, and also bonds and mortgages held by him to the amount of \$25,000, with power to withdraw either of these collaterals, leaving the other; this was in December, 1853. Mr. Walsh had resigned his commission in the navy soon after his marriage, remained without employment, and had no resource but the fortune of his wife. He was a gentleman of cultivation and refinement, and of extravagant tastes and habits. The residue of McCall's estate, amounting to about \$13,000, which had all, except a few hundred dollars, been paid over after his marriage, was soon spent, and shortly after the death of his wife he was in need of funds.

In this situation Walsh readily entered into an agreement with McKnight, which was reduced to writing and signed by both, dated August 9th, 1855. By this the trust fund

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was to remain as it was then invested. The trustee was to pay Walsh the half year's interest then in arrear, and after that \$1000 of the interest, yearly, for the proper maintenance and education of the infant; was to retain \$500 a year for two years, making \$1000 on the whole, in full for his commissions, and was to invest the remaining \$500 of the interest, after the first two years, for the benefit of the infant.

Some time in 1856, Walsh found out that McKnight had taken from the cashier not only the mortgages deposited as collateral, which had been done by the written consent of Mrs. Walsh, but also the certificates of bank stock left with him. This, and an unfounded report that McKnight was embarrassed by endorsements for a son who had failed, alarmed Walsh for the safety of the fund, and he determined to compel him to invest the fund as directed by the will. For this purpose he employed the present Chief Justice, then at the bar. Mr. Beasley put himself in immediate communication with McKnight, called upon him, and wrote to him, and insisted upon the fund being secured. He asked for investment and security only, not for any increase of allowance to Walsh. McKnight, unwilling to give up the fund, offered to deposit securities as collateral, and volunteered an offer to increase the allowance to Walsh out of the interest. The negotiation ended in McKnight making a deposit of two hundred and fifty shares of the stock of the Camden and Amboy Railroad Company in the hands of Mr. Beasley, as collateral security, to remain until other security should be given, satisfactory to Mr. Beasley. This agreement of pledge, executed by McKnight and Mr. Beasley, under seal, was signed July 14th, 1856. It was considered by Mr. Beasley only as a temporary measure, until a permanent investment should be made. In the negotiations, Walsh wrote to Beasley that the use of the whole income was a great inducement to him, but he feared it was hung out as a "bait or catch," to make him more easily satisfied with the securities.

These securities remained in Mr. Beasley's hands until McKnight's death, and still remain there. They are ample

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to secure the trust fund. McKnight paid Walsh \$1000, yearly, for the first two years, and after that the whole income of \$1500, until the death of Walsh, according to the intimation conveyed through his counsel, the written agreement to pay \$1000, being unchanged, and Walsh gave no further trouble about investment or securities. After the death of Walsh, McKnight paid to the guardian of the infant annual allowances, approved of and directed to be paid as proper for his education and maintenance—at first, while he resided in New York, by the surrogate of the city, who appointed her his guardian, and after they removed into this state, fixed by this court.

The accounts of the trustee were, in this cause, referred to, and have been stated by a master. The master allowed the trustee the full income until the death of J. C. Walsh, paid to him upon the understanding above mentioned. He also allowed the \$1000 retained by the trustee as commissions. He charged the trustee with interest on the excess of the income above the amounts paid for support and education since the death of J. C. Walsh, but only with simple interest, and did not make annual rests in the account so as to compound the interest.

To this account exceptions are taken on the part of the infant. These can be ranged under three classes:

First. To the allowance of the whole income during the life of J. C. Walsh, when it is alleged that he should have been allowed only so much as was proper and necessary, and actually expended for the support of the infant.

Second. To the allowance of \$1000, as commissions, when the trustee was entitled to no commissions.

Third. To the allowance of simple interest only. The exceptant contends that, as the money was retained by McKnight in his business, and not invested, that he should have been charged with the profits made in the business, or at least with compound interest by semi-annual rests.

As to the first class, it is not claimed, on part of the complainants, that the proper education and support of the infant

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required the whole income of \$1500. The infant was seven years old at the death of his father, and it is admitted that a much less sum, less than one-half, would have been sufficient for his support and maintenance in a manner suited to his condition and fortune. Less than half was allowed after the death of the father for some years, and was ample for the purpose.

But the allowance of the whole is claimed on two grounds: *first*, that the will of McCall authorized the expenditure of the whole; and *secondly*, that the father was entitled to it as necessary for him to support and maintain an establishment suitable for this child as a member of his family.

The will was made two years before the testator's death, and before the daughter was married or had any child. It provided for her death, leaving one or more children—the number could not be foreseen, and very probably for the object in view, directed the expenditure of the income for the proper maintenance and education of such child or children. It is, perhaps, unguardedly drawn, but the intention of the testator cannot be mistaken and is expressed. The object, and only object, is "the proper maintenance and education of the child or children," and the person who is to apply or expend it is the executor. The will did not authorize it to be expended for the support of the father of the child, nor for such maintenance or education as was not proper or suitable to the condition or fortune of the child; nor when the actual amount expended for the maintenance and education was only \$500 yearly, to pay the whole income of the estate, being \$1500, to the father, for that or any purpose. In general, a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court, based upon his inability to support them properly. But in this case the testator directed this income to be appropriated for that purpose, and no order was required while the expenditure was within the direction. But none of it could, by virtue of this direction in the will, be appropriated to any other

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purpose, as the support of the father without an order, even if it was clear in this case such order could have been made.

On the other ground, it is claimed that the court should now confirm such payments made in good faith, if it would on application, have made such order. That it would have been made, is contended on the force of some precedents in England and in this court, and one in the Vice-Chancellor's Court in New York. The position assumed is that such allowance will be made from the estate of an infant as will be sufficient to maintain his father, mother, brothers, and family in a style suitable to his estate and condition.

The dicta and authorities in the English cases are founded upon the law of primogeniture and the established custom among the nobility and gentry, by which the heir-at-law upon whom the family seat devolves, as well in infancy as when of age, is, by their customs, bound to keep up the family mansion as a home for his sisters and younger brothers, and is allowed out of his estate sufficient for that purpose.

The only decision on application of the rule that I find, is the case of *Bradshaw v. Bradshaw*, 1 J. & W. 627, in which a liberal allowance was directed to be made to an infant heir in consideration of the support of an infant brother, an illegitimate child of his father and mother before their marriage, who had lived with and been provided for by the father before death. In *Harvey v. Harvey*, 2 P. W. 21; *Pierpoint v. Cheney*, 1 P. W. 493; *Lanoy v. Athol*, 2 Atk. 447; *Petre v. Petre*, 3 Atk. 511, no application was made of this rule, but it was stated as the rule of the Court of Chancery. In New York the only case seems to be that of the *Matter of Burke*, determined by Vice-Chancellor Sandford, 4 Sandf. Ch. 617. In that case an *ex parte* order had been made, allowing the father of the infants, aged eleven and thirteen, the yearly sum of \$3500 for their support. The income of these children was between \$3500 and \$4000 yearly. The fortune of one was \$30,000, of the other \$60,000, on arriving of age. The father actually expended for them \$1561 in one year, besides keeping them at his house when home from school. His

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income was barely sufficient to maintain himself, his second wife and family, in the manner in which they were living. Upon application of relatives of the children, the allowance was referred to a master, who reported \$1500 per annum as sufficient for both. The Vice-Chancellor, upon exceptions by the father, increased the amount to \$2500, on the ground that the father required this to enable him to keep up such an establishment as a home for these daughters as he was keeping, suitable to their rank and expectations. This case stands by itself in New York. The case of *Wilkes v. Rogers, 6 Johns. 566*, referred to in support of it, contains nothing to maintain its principles. It goes far beyond any decision, doctrine, or dicta in any of the English cases. I am not willing to adopt a principle by which the fortune of infant daughters derived from their mother, shall be appropriated to maintain their father, his second wife and her family, in a manner that his own means will not warrant, because it is suitable to the condition and prospects of the infants. They might, perhaps, be authorized to pay their proportionate share of the expense of such establishment, but the principle should go no further.

The authorities in New Jersey relied on are three orders made by Chancellor Williamson on *ex parte* applications. The first, in 1854, in the case of Thomas Potter's children. The estate consisted of \$612,000 in cash, and the mansion-house at Princeton, valued at \$40,000. The income exceeded \$40,000. The mother of the three infants continued to live in the family mansion in the same manner as their father had done in his lifetime. And the Chancellor allowed the \$8000 yearly for their support, and for the two sons of seventeen and nineteen, respectively, who were away for their education, such sums as should be expended for them. The income of each of these children seems to have been from \$5000 to \$8000; the allowance was \$2666, yearly, to each.

The second was the allowance to the widow of Morgan G. Colt for the support of her three children. Her son had a fortune of \$40,000, her two daughters \$20,000 each. Their

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income was the interest of these sums. The mother had no fortune and no income, and desired to keep up an establishment as a home for her children under her personal care. The Chancellor allowed her \$3500 a year for this purpose—little more than half their incomes.

The third case is that of James Wood's two children. They had a fortune in the hands of a trustee of \$20,000 ; the whole income was the interest, \$1200. Their father was entirely without means, improvident, and intemperate. The Chancellor directed the trustee to pay to the father \$7 per week for board, and \$200 per annum for the clothing of each, amounting to \$1126 in the whole.

The statement of these cases shows how entirely they differ from the present. Were this an application for an order to allow this income to be paid for the future, such order could not be sustained on them as precedents.

But there is no precedent for the allowance of such payments for the support of the father, when made without the order of some competent court. It would be dangerous to make such precedent. Trustees and relatives, as here, would combine to use the whole fund, however unnecessary, and then claim allowance because done in good faith, and in the exercise of a discretion committed to them.

In this case the trustee can only be allowed for so much as was paid for the proper maintenance and education of the infant. All beyond that he has paid in his own wrong. And I am not satisfied that this payment was made in good faith. On the contrary, I am convinced that it was made by a bargain made by him with the father that it should be paid, provided the father would not insist upon his performing a duty required of him by law as to investing these moneys ; a duty well known to him, and which it was profitable for him to neglect. There is no foundation for the claim that he did it by the advice of counsel. The only opinions before the death of Mr. Walsh were those of Mr. Wood, adverse to allowing the money to be uninvested, and to the allowance of the whole income for support ; and those were not opin-

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ions of his own, but of adverse counsel. Mr. Beasley and Mr. Wood, by consenting to the deposit of the railroad stock, did not advise that as sufficient, or the payment of the whole interest as proper, but it was adopted as a means of securing with safety for a temporary purpose, a fund thought to be in jeopardy. The only opinions ever had by McKnight were those of Mr. Beasley and Mr. Cannon, after the death of Walsh, but he was guided by neither. Neither of those were intended to approve, or did approve, his payment of the whole income to Walsh, though one of them alluded to a case in which a larger amount had been allowed than was required for support.

I am willing to make a large allowance for the support of this infant until his father's death, while still under seven years old. \$700 a year, I am satisfied, will cover all that was expended for that purpose. And I am willing to allow it without reference to a master, because, in the situation of this case, it would be impossible for a master to ascertain the amount expended or required. To the extent of all beyond that sum, the exception to this allowance is sustained.

As to the charge of compound interest, or the profits on the railroad stock, or any other business in which the money was engaged, although some principles are clear and well settled, yet their application is uncertain. The courts and decisions differ. Where a trustee has invested the trust fund in business, trade, or speculation, he can be called upon to account for the profits made by it, or at the option of the *cestui que trust*, to interest at the highest rates, and with yearly rests or compounded. This is decreed as a penalty for his breach of duty. But it is only in cases of gross misconduct, never for a mere neglect of duty, as for not investing the trust funds, but letting them lie idle. But in cases where the trust fund has been invested in trade or speculation, or continued in them, profits or compound interest have been generally required. 2 *Story's Eq. Jur.*, § 1277; *Hill on Trustees*, *372, *375; *Lewin on Trusts* 361, 363, 364; *Perry*

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on Trusts, § 471; *Raphael v. Boehm*, 11 *Ves.* 92; *William v. Powell*, 15 *Beav.* 461; *Schieffelin v. Stewart*, 1 *Johns. Ch.* 620; *Barney v. Saunders*, 16 *How.* 572.

In most of the cases where the trustee has been charged with compound interest or profits for using the trust fund in his own business, the trust fund was embarked by him in the business; but in *Jones v. Foxall*, 15 *Beav.* 388, the defendant, Foxall, was a member of a firm to which the fund had been loaned before the trust. By the articles of settlement, which constituted him trustee, he was directed to call in and invest this sum. He neglected to do so, but continued to use it in the business of the firm of which he was a member. This was held by the master of the rolls to make him liable to compound interest. That case is much like the present. Here the money, or almost the whole of it, had been advanced by McCall in his lifetime. It had, beyond question, been used by McKnight in his business. Contrary to express direction to invest, he retained the money in his own hands, and kept it in his business. His railroad stocks, evidently, from the date of the certificates, were not bought with it. But to pay in this fund might have obliged him to sell them. It is not possible to ascertain how he did use this money. It was originally invested in his own business, in which he had then a perfect right to invest it as he pleased. And there is no authority or principle that will require a trustee to account for the profits of a business in which the fund was originally invested lawfully, merely because he neglected to withdraw it from that business.

But I think that this is a proper case to charge the trustee with annual rests and compound interest, both on the ground of his violation of trust in neglecting to invest and continuing to use the money, as Foxall did, and on the further ground that in at least one of his investments, that in railroad shares, which he was enabled to keep by not paying in his debt, he actually received the income half yearly. I think, from the fact of his allowing those shares to remain in pledge for this trust fund from 1856 until now, we are

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entitled to conclude that the fund was by him considered invested in those shares. He received the dividends half yearly, and had actually the use of them in his business, including the part that constituted the interest of this fund. He frequently borrowed money, and had the use of this, and either made or saved the interest upon it. The excess on the half yearly interest was too small to invest, and, although he had the use of it, yet as he could not have invested it, he will only be held for yearly rests. The interest on these, in the whole, amounted to a considerable sum, and as in his transactions this interest was, without doubt, used by him, and the interest on it gained or saved by him, it is right that he should account for it, not merely as a penalty for culpable neglect, but as gains actually made by him out of the trust fund. The exception as to compound interest must be sustained, and the account taken with yearly rests, and the interest compounded at the rates adopted by the master. But no interest must be charged on the amounts paid to J. C. Walsh in excess of the \$700 per annum, as the trustee has not had the use of such excess or received interest upon it.

The trustee, in this case, is not entitled to any commissions. He has violated his trust by not investing the fund, and using it in his own business. *Warbour v. Armstrong*, 2 Stockt. 263; *Frey v. Demarest*, 2 C. E. Green 71, and *Moore v. Zabriskie*, 3 C. E. Green 51, are authorities to show that in New Jersey this forfeits commissions.

But independent of this rule, the trustee is entitled to charge no commissions on this trust fund as against this defendant. *First*. Because he has never collected it, or done anything as executor relating to it. At the death of the testator he owed this amount to the estate; he owes it still; one dollar of it has never been paid. The bond has been canceled, but that was not payment. He never even went through the form of depositing in bank the amount to his credit as executor. When an executor dies without having collected any part of the assets, he or his representatives are not entitled to commissions on the part not collected. They

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belong to the administrator *de bonis non* who shall collect them. The act (*Nix. Dig.* 645, § 26,) directs that commissions shall be allowed in reference to pains, trouble, and risk incurred in settling the estate. As to this amount, he has taken no pains, trouble, or risk in collecting or settling it; his only pains have been as a debtor to defer payment of his debt to the estate, which still remains, and which an administrator might have been appointed to collect after his death. The payments of interest were made by him as debtor, as it accrued on the sum he owed; he would have made these as such to McCall had he lived.

Again, the commissions on the principal of the trust fund, had he collected it, could not have been allowed out of, or deducted from it, but from the residue of the estate. Every bequest of a specific legacy or a specific sum must be paid entire; the commissions, like the other expenses, must come out of the residue of the estate. The \$25,000 belongs to the defendant, free from expenses or commissions. That he paid over the residue without deducting commissions, if he was entitled to them, was his own folly, unless he intended not to charge them to his niece. Walsh could not bind the infant or this fund for their payment. Had the trustee invested this fund, and collected the interest on the investment, and paid it over to the person entitled to it, he would have been entitled to such commissions on that as the proper tribunal should allow, not such as was agreed upon by a person who has no interest in the amount.

If commissions could be allowed, as against the infant, upon the income, the whole amount, at the highest rate allowed by law, would be less than \$700, to be taken on the settlement of the account—that is, upon the final decree in this suit. The amount retained by him, with simple interest, would now exceed \$2000.

The charge for commissions must be wholly disallowed; and as this sum of \$1000 was retained by him, it must be included in the balance on which compound interest is to be computed.

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WILSON vs. KING and FORD.

1. A parol agreement by the grantee, at the time of taking a deed, that he would assume a mortgage upon the property as part of the consideration, will be enforced in equity. A covenant in the deed that the premises are free from encumbrances, or any other covenant, will not estop the assignee of such mortgage from recovering on such undertaking.

2. The proof in this case is sufficient to warrant a decree for deficiency in proceeds of sale against the grantee. But the allegation of the bill being that the undertaking was a stipulation contained in the deed, and that the grantee became bound by the acceptance of the deed, while the proof is that it was not contained in the deed, but was a parol promise at the making of the deed, the variance is fatal to such a decree.

3. An agreement between solicitors to amend the bill so as to conform to the facts, there being no amendment actually made, cannot avail on the hearing for final decree. Neither an agreement to amend, nor an order giving leave to amend, amounts to an amendment, even if filed.

4. To entitle a complainant to a decree in a foreclosure suit for any deficiency of the proceeds of sale in discharging the mortgage, the party sought to be charged must have been served with notice that such decree would be asked for against him.

5. The usual covenants in a deed are not part of the conveyance of real estate. They are mere personal covenants. A covenant against encumbrances, therefore, by a married woman, resident in the state of New York, in a conveyance of her husband's property, situated in this state, the law of New York not authorizing a married woman to enter into covenants as to her husband's property, does not affect, nor does any estoppel arising therefrom affect, a mortgage upon the property given by the husband prior to the conveyance, and which, after the conveyance, was assigned to the wife, and by her assigned to another. Her assignee would be entitled to a decree but for the defect in the pleading.

Argued upon final hearing, on bill, answer, replication, and proofs.

Mr. A. K. Brown, for complainant.

Mr. Stone, for defendants.

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THE CHANCELLOR.

The defendant, Ford, on the 15th of December, 1858, executed a mortgage to Harriet Woodward for \$500. This is the mortgage sought to be foreclosed in this suit. It grants and conveys the property to the mortgagee, without any words of inheritance. The bill, in stating the mortgage, states that it conveyed the premises to Mrs. Woodward, "her heirs and assigns for ever, in fee simple." Ford and his wife Laura, by deed dated April 4th, 1858, acknowledged and recorded April 4th, 1859, (on which day it probably should have been dated, as stated in the bill,) conveyed the premises in fee to the defendant, King. This deed contained the usual covenants. The covenants of seisin, for quiet enjoyment, against encumbrances, and for further assurance, are expressed to be by the "parties" of the first part; this includes Mrs. Ford; the covenant for warranty is by Mr. Ford only. Ford and his wife resided in New York, and the deed was executed and acknowledged in New York before a commissioner for this state, residing there. On the 2d of August, 1865, Mrs. Woodward assigned the mortgage to Mrs. Ford, who on the 2d of December, 1867, assigned it to the complainant.

The bill states that in the deed to King it was stipulated that the lands were conveyed subject to the mortgage, and that the same was assumed to be paid by King as part of the consideration, and prays for a decree against King and Ford for any deficiency of the proceeds of sale in discharging the mortgage. But no notice that such decree would be asked for was served on either, as required by rule thirty-eight.

I find among the papers handed to me one signed by the solicitors of the parties, but not dated or filed, by which they agreed that the bill should be amended by striking out the allegation that this stipulation was contained in the deed, and by adding an allegation that it was by parol agreement at the time of giving the deed, and that King retained the amount of the mortgage out of the consideration money. But this amendment has not been made in the bill.

The only answer is that of the defendant, King. Ford was never brought into court. King denies all knowledge of

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the mortgage or the assignment of it; avers that if any mortgage was given, it was without consideration, and fraudulent. He admits the deed to him, but denies that it contained a stipulation that he should assume the payment of the mortgage, and alleges that it contained full covenants of warranty, and purported to convey the premises free from all claims or encumbrances whatever. But it does not state that Mrs. Ford joined in the covenants, nor set them up by way of estoppel against the mortgage.

The complainant's relief, in this case, must be upon the mortgage, or the undertaking of the defendant, King, to assume and pay it. This cannot be had upon the mortgage, because the mortgage produced in evidence is entirely different from that set forth in the bill. The bill states a mortgage to Mrs. Woodward, her heirs and assigns, in fee. That produced is to her, without any words of inheritance; this is for her life only. The variance is substantial and radical. A decree *pro confesso*, or any decree in general terms, for the sale of these mortgaged premises, would be a decree to sell the fee, and would deprive the defendant of the whole fee. No application was made at the hearing to amend the bill; in fact, from the evident negligence with which the bill was drawn, and the proceedings in the cause conducted, it is doubtful whether the solicitor of the complainant ever noticed the defect, or even read the mortgage. It was not alluded to in the argument on either side. It will be in time to determine whether the bill can yet be amended in this respect, when application shall be made for that purpose. It does not appear in the case whether the mortgagee is living; if dead, such application would, of course, be of no avail. The doctrine of variance prevails in equity, as at law, though enforced with less strictness.

The undertaking of King to pay the mortgage would be enforced in equity, if proved. The covenant in the deed that the premises were free from encumbrances, or any other covenant, would not estop the complainant from recovering on such undertaking. It was so held by the Court of Errors in *Bolles v. Beach*, 2 Zab. 680. That was a suit by grantor

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against grantee, on a verbal promise at the conveyance to assume and pay a mortgage of \$1000, on the premises conveyed. The deed was with full covenants, including that against encumbrances, and it was declared that neither the covenants nor the recital that the consideration was paid in full, or the release for it, estopped the grantor from proving and recovering on the verbal agreement. The court held that the estoppel only applied when the proof was offered for affecting the validity of the deed. And it is settled that in equity the mortgagee may recover against the grantee on such undertaking to the grantor, as an equitable undertaking to him, although in a foreclosure suit no recovery could be had against the mortgagor on his bond for the deficiency until the act of 1866. *Nix. Dig.* 119, § 104.

The proof in this case is sufficient to warrant such decree. Mr. Wetmore, a counselor-at-law in New York, testifies that he was consulted in the negotiations about this conveyance to King, and that King agreed to take the title subject to this mortgage and to assume its payment. Mr. Ford also testifies to this. Mrs. Ford testifies that King, at the conveyance, was told of this mortgage, and knew it was upon the property. There is no testimony to contradict this. The answer of King does not contradict it. That states simply that there was no such stipulation in the deed to him. The settled principles of law and equity and the evidence in this cause, will warrant a decree against King to pay any deficiency in the proceeds of the sale to satisfy the amount due on this mortgage. But for this again the pleadings are insufficient. The bill states the undertaking as a stipulation contained in the deed, and that King became bound by the acceptance of the deed. The proof is, that it was not contained in the deed, but was a parol promise at the making of the deed. Neither at law nor in equity, would a declaration or bill upon a bond or promissory note be sustained by proof of a parol promise to pay the amount. The draftsman of the bill could not have read the deed. The agreement for amendment can be of no avail here. There is no amendment actually made. If a decree was signed, the

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unamended bill would be enrolled and the decree would be set aside upon appeal. Neither an agreement to amend, nor an order giving leave to amend, amounts to an amendment, not even if filed in the cause. Such practice could not be tolerated. It would lead to great and inextricable confusion in enrolling the proceedings. The enrolling clerk would have to collect the orders and agreements, if they were not mislaid and could be found, and by cancellations and insertions, adjust them in the bill, in which he would be liable to serious errors. The bill, when amended, should either be re-engrossed, or the amendments actually made by canceling and interlining, or by the substitution of sheets in the place of the canceled parts containing the amendments to be inserted. And in this case the amendment never having been made or filed, King has no opportunity to answer the allegation of a parol agreement. His responsive answer might have changed my conclusions as to the evidence.

But if the necessary amendment had been actually and properly made, there is another obstacle to a personal decree against King for the payment of the deficiency of the proceeds of sale of the Woodward life estate to satisfy the amount due. Rule thirty-eight declares that in a foreclosure suit no decree shall be made against any defendant for a deficiency, unless a notice that such relief is sought be served on him with the subpœna. In this case no such notice was served.

The matter mainly argued on the hearing of this cause was the question of estoppel. It is contended that the covenant of Mrs. Ford against encumbrances, when this mortgage was assigned to her, operated by estoppel to extinguish the mortgage, or, at least if it did not operate as a conveyance, it estopped her personally from setting up the mortgage, and that the complainant, her assignee, took it subject to all equities and defences that existed against it in her hands.

An estoppel will, in some cases, operate as a conveyance. It does not merely have the effect, which is personal, of preventing the party from averring anything against his act or deed, but in some cases it is held that the covenant of war-

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ranty will transfer to the grantee after acquired title of the grantor, which, as is said, feeds the estoppel, and by the warranty passes to the grantee as soon as acquired. *Gough v. Bell*, 1 Zab. 164. This is one of the positions in that noted case which has never been doubted or reversed. But I know of no case that gives this effect to any other covenant than that of warranty. That covenant has always been peculiar in its effects.

In other cases the covenants are personal only, and estop the covenantor, his heirs and assigns, from averring to the contrary. The covenant against encumbrances is a personal covenant; if untrue, it is broken as soon as made; it does not pass with the land, and the grantee or his personal representatives alone can recover on it.

And it is held in states where married women have power to convey by statute, but no power to enter into contracts or covenants, that the covenants or the warranty of a married woman, even in deeds properly acknowledged, do not operate as an estoppel, either to prevent them from averring to the contrary or to convey the estate. *Jackson v. Vanderheyden*, 17 Johns. 167; *Martin v. Dwelly*, 6 Wend. 9; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Dominick v. Michael*, 4 Sandf. R. 424; *Wight v. Shaw*, 5 Cush. 66; *Den v. Hopper v. Demarest*, 1 Zab. 541.

If the covenants of a married woman could be held to operate as a conveyance, these cases were wrongly decided, as in those states married women had then power to convey lands, but not to enter into any contract or covenant. And this was extended by these decisions even to the covenant of warranty. In *Den v. Demarest*, the covenant of Mrs. Hopper included that of warranty, and the opinion of Chief Justice Green in this matter was concurred in by Justices Randolph and Whitehead, in the Supreme Court, and by Justice Carpenter and Judges Schenck and Porter, in the Court of Errors. And although Chancellor Halsted expresses some doubt of it, he does not place his opinion on that ground, and the judgment was reversed on the ground that Mrs. Hopper,

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at the conveyance, had a vested estate. These cases settle the principle that laws which confer on married women the power to convey lands, do not confer on them the power to bind themselves by covenants in such conveyances as a part of the power to convey.

Now it is true that by the act of March 20th, 1857, (*Nix-Dig.* 548, § 7,) a married woman may bind herself by covenants as to land in a deed entered into with her husband. Yet it is also true that Mrs. Ford was a resident of New York at the execution of the deed, and that it was executed in New York. And the capacity of any one to enter into a personal contract, and all questions with regard to personal status and capacity, are governed by the law of the domicile, especially when that is the place of the contract. The only exception is as to transfer of real estate, either by conveyance or succession; that is governed by the law of the location of the real estate.

If these covenants were part of the act of transferring real estate, they would be valid if authorized by the law of this state. But the decisions above referred to settle the question that they are not part of the conveyance of real estate, and were not, therefore, made valid by the acts authorizing married women to convey. If, then, these covenants are mere personal covenants, the capacity of Mrs. Ford to enter into them, must be determined by the law of the state of her domicile where the covenants were made. Now the law of New York did not then, nor does it now, so far as I am informed, authorize a married woman to enter into covenants as to her husband's property. She can there make contracts as to her own property. She might, perhaps, as to her right of dower, or even her inchoate right of dower in this land. It would only in such case bind or estop her as to that right of dower, which is not in question here. If it were in question, it would not be affected by this mortgage, as it is not signed by her.

This conclusion is one that will effect justice in this case. It would be inequitable that the title to a just mortgage,

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against which there is no other defence, should be destroyed in the hands of a *bona fide* holder by the artificial and technical defence of an estoppel, where the covenant in the deed that is relied on to effect it was inserted by mistake, and in which, by another mistake as evident as that, a married woman who joined in the deed to release her right of dower, was made to join in the covenants.

But, although the mortgage is not affected by these covenants, or any estoppel arising from them, for the reasons above given the bill must be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY *vs.* THE NEW YORK AND LONG BRANCH RAILROAD COMPANY.

1. The act of March 30th, 1869, authorizing the New York and Long Branch Railroad Company to extend their road across the Raritan river, and to cross the river by a bridge, gave that company an absolute, unconditional authority to enter upon and appropriate the lands of the state under water, without compensation.

2. The grant to the United Companies, by the act of March 31st, 1869, of the right to reclaim and erect wharves and other improvements in front of any lands owned by them, or either of them, adjoining any tide waters of this state, and when reclaimed and improved, to hold the same as owners, is subject to the authority given to the New York and Long Branch Railroad Company, to enter upon the lands of the state for the purpose of building such bridge. The Pennsylvania Railroad Company, therefore, the lessee of the United Companies, who owned lands at South Amboy, in front of which the New York and Long Branch Railroad Company have commenced to build said bridge, has not, under said act, a right of property in these lands under water, for which compensation must be made before these lands can be taken.

3. That the act authorizing the bridge did not provide for a draw does not invalidate it; nor does the fact that no draw was provided for until the act of April 1st, postpone the taking effect of the act of March 30th, until that day. The act took effect immediately.

The argument was on a rule to show cause why an injunction should not issue to restrain the defendant from build-

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ing a bridge across the Raritan river at South Amboy over lands under water, in front of lands of the Camden and Amboy Company, leased to the complainant.

Mr. I. W. Seudder, for complainant.

Mr. C. Parker and *Mr. B. Williamson*, for defendant.

THE CHANCELLOR.

The legislature, by an act approved March 30th, 1869, authorized the defendant to extend its road across the Raritan river, and to connect the same at or near Perth Amboy with any railroad there, and authorized it to cross the river by a bridge. Its original charter fixed the beginning of its road to a point at or near the village of South Amboy. Another act, approved April 1st, 1869, required a draw one hundred feet wide to be constructed in the bridge.

By an act, approved March 31st, 1869, the legislature authorized the United Companies of New Jersey, of which the Camden and Amboy Railroad Company was one, to reclaim and erect wharves and other improvements in front of any lands owned by them, or either of them, adjoining any tide waters of this state, and when reclaimed and improved, to hold the same as owners. The Camden and Amboy Railroad Company owned lands at South Amboy, on the Raritan, which, with all property and privileges of the United Companies, are held by the complainant by lease.

The defendant has located the route of its road and bridge—the bridge route crossing the Raritan from Perth Amboy to South Amboy, and over lands in the river, in front of these lands owned by the Camden and Amboy Company—and has commenced building the bridge and driving piles in the river bed, and intends to continue the bridge and driving piles in the river in front of and adjoining these lands of the Camden and Amboy Company. It has not made, and does not intend to make, compensation for these lands under water before erecting the bridge, but has commenced proceedings for con-

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demning the lands of the Camden and Amboy Company, occupied by the route of the road, and adjoining the river.

The injunction is asked for on the ground that the complainant has a right of property in these lands under water, for which compensation must be made before these lands can be taken.

The facts of the case are clear and undisputed. The question is as to the rights of the parties upon these facts.

It is settled by the decision of the Court of Errors and Appeals in the case of *Stevens v. Paterson and Newark R. R. Co.*, 5 Vroom 532, that the lands under water, including the shore on the tide waters of New Jersey, belong absolutely to the state, which has the power to grant them to any one, free from any right of the riparian owner in them.

The act of March 30th, 1869, authorizing the defendant to build a bridge over the Raritan, between South Amboy and Perth Amboy, gave it the right to enter upon and occupy so much of the lands of the state in the river, as should be required for the bridge, or of the width at which it was authorized to lay out its route. This act vested this right in the defendant. The act took effect immediately. I cannot assent to the position taken by the counsel of the complainant, that this act was void because it did not provide for a draw, and did not take effect until the act of April 1st, providing for a draw. If the legislature could not or did not intend to authorize a bridge without a draw, the act authorized a bridge with a sufficient draw, and the act of April 1st fixed what should be the width. This right was a franchise; it was property; it was also an easement in the lands under water.

The authority thus given by the state did not require compensation for the lands of the state thus occupied. It was an absolute, unconditional authority. And the constitutional provisions only regard private property, and the defendant's charter only requires it when lands are entered on without consent. The right is given without compensation.

The universal understanding in the state, for near a cen-

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tury, has been that a statute that gives authority to bridge a navigable river, gives authority to appropriate the lands under water, belonging to the state, without compensation. There are many railroad bridges thus authorized, and many more turnpike and county bridges. When the state authorizes a corporation or an individual to build roads or bridges upon its property, as the duty to be performed is that of the sovereign delegated to a citizen, it implies the right to proceed without compensation. The question has never been settled by the courts. In the cases of *The Att'y Gen'l v. Stevens, Sart.* 369; *The Att'y Gen'l v. The N. J. R. R. Co., 3 Green's Ch.* 136; and *The Newark Plank Road and Ferry Co. v. The Att'y Gen'l, 1 Stockt.* 754, in all of which lands under tide waters were taken and occupied, the question was not alluded to by the court or by counsel. In each case the want of compensation, if necessary, would have been a ground to stay the work.

With this right vested in the defendant, the state, on the next day, authorized the United Companies to reclaim, and when reclaimed to appropriate. Like all other grants, it must be subject to prior grants made by the same grantor; in this case, subject to the right of the defendant to occupy the lands by the bridge, if the route of the bridge should be laid across the river adjoining the lands of the Camden and Atlantic Railway Company.

If the owner of a large tract of land grant to one the right to have a way over the tract wherever the grantee shall locate it within a given time, and then conveys part of the tract to a purchaser who has notice of the grant, he takes it subject to the right of locating a way over it, and cannot restrict the grantee of the way to the part retained by his grantor. This conclusion arrived at upon this point makes it unnecessary to examine or determine the other questions raised at the argument.

The superior right of the defendant seems to me to be clear. If I am mistaken, yet, as the right of the complainant in this case depends upon a question which has never been

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settled by the courts of this state or elsewhere, and is, at best, matter of doubt, by the well-established principles of equity the injunction must be refused and the rule discharged. I am the more willing to decide in this manner, as the case is one that looks to money compensation only, which can be had at law, and no irreparable injury can ensue from this course. An important public work should not be delayed by an injunction, except the right to be protected is clear and without serious doubt.

THE MANHATTAN MANUFACTURING AND FERTILIZING COMPANY vs. THE NEW JERSEY STOCK YARD AND MARKET COMPANY and others.

1. The New Jersey Stock Yard and Market Company leased to the Manhattan Manufacturing and Fertilizing Company certain premises for the specified business of manufacturing and preparing fertilizers and manures, and the materials for that purpose. The lessors gave the lessees "the refusal and exclusive right of saving and taking all the blood of animals slaughtered in their abattoir and sheep-house, and of saving and taking the animal matter and ammonia from their rendering tanks, and of using the same in their business." The fertilizing company thereby bound themselves "to save all that is possible of the blood from the animals slaughtered, and the animal matter and ammonia from the tanks, to prevent any effluvia or stenches from escaping, and to prevent any and all nuisances from being created in any manner whatsoever, either in saving the blood, animal matter, or ammonia, or in converting the same into articles of commerce." The stock yard company subsequently leased their abattoir to Payson and Sherman. Sherman entered into partnership with two other of the defendants (at the time of the lease in the employ of the stock yard company,) under the name of the Bergen Manufacturing Company, for the manufacture of albumen and fertilizers. The complainant demanded all the blood of the animals slaughtered at the abattoir, but by an arrangement with certain butchers who slaughtered there, the Bergen Manufacturing Company have been and are taking a large part of the blood. Held, on application for injunction, that with every permission to use the abattoir after the lease, the stock yard company had the right to demand that every user of the abattoir should leave these matters for the complainant; and this, by its covenant, it was bound to do. And the de-

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defendants, having notice of this obligation, must be restrained from taking the blood and other matters which the complainant is entitled to take under its lease.

2. Such injunction is not mandatory. It does not require the delivery of the blood, but restrains the defendants from permitting any others than the complainant to take it.

3. The remedy at law is inadequate. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion.

4. A deed of a corporation, under its corporate seal, and signed by the proper officer, is presumed to have been executed by authority of the corporation. An allegation in the bill to the contrary, supported only by an affidavit of belief that the facts are true, is not sufficient to overcome the presumption.

The argument was upon a rule to show cause why an injunction should not issue to restrain the defendants from suffering or permitting any other person than the complainant to take or save any of the blood of the animals slaughtered at the abattoir of the stock yard company, at Communipaw, in the county of Hudson.

Mr. McCarter, for complainant.

Mr. I. W. Seudder and *Mr. Winfield*, for defendants.

THE CHANCELLOR.

The complainant is a corporation of the state of New York, doing business at Communipaw. The defendant, the stock yard company, a corporation of this state, owns a large and extensive abattoir, or slaughter-house, at Communipaw. It has not, for some years, slaughtered animals there, but let to butchers the privilege of slaughtering their animals in the abattoir. Previous to August, 1870, the blood and other remains of animals thus slaughtered there by the butchers, not being removed or properly cared for, had created a stench which became a nuisance to the adjoining country, and the company was restrained by an injunction from permitting the business to be carried on there, unless on condition of having the blood and offal perfectly cared for. The butchers paid

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: the privilege of slaughtering there, and left the blood and al on the premises, to be cared for by the stock yard company. These difficulties became a serious embarrassment in the enterprise. The complainant undertook to manage this, and to remove and manufacture the blood and other abandoned refuse left on the premises by the butchers, so as to prevent any public or private nuisance that might else arise from them.

To effect the objects of this arrangement, the stock yard company, on the 5th of August, 1870, made a lease to the complainant of certain premises adjoining the abattoir, for the specified business of manufacturing and preparing fertilizers and manures, and the materials for that purpose. The term was for twenty years from April 20th, 1867, with privilege of renewal, and the rent to be paid was fifteen per cent. of the net profits of the business. The lease contained this provision: "The parties of the second-part shall also have the usual and exclusive right of saving and taking all the blood of the animals slaughtered in the abattoir and sheep-house of the parties of the first part, and of saving and taking the animal matter and ammonia from the rendering tanks of the parties of the first part, and of using the same in their business." And also this agreement on part of the complainant: "Said parties of the second part hereby bind themselves to save all that is possible of the blood from the animals slaughtered, and the animal matter and ammonia from the tanks, to prevent any effluvia or stench from escaping, and to prevent any and all nuisance from being created in any manner whatever, either in saving the blood, animal matter, or ammonia, or in converting the same into articles of commerce."

The lease was executed by the president of the stock yard company, in the name of the company, by affixing its common seal and his signature. The execution was duly proved, and the lease recorded in Hudson county clerk's office, August 20th, 1870.

The complainant, on faith of the lease, erected on the designated premises expensive buildings and machinery for the

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purpose of the manufacture. These were completed by January 9th, 1871. In the meantime arrangements had been made by the complainant with the stock company and its employees for coagulating the blood on the premises, and for preventing nuisances arising from slaughtering in the abattoir. Part of this coagulated blood had, with complainant's acquiescence, been delivered to John J. Craven, one of the defendants, for making experiments or manufacturing it.

In April, 1871, the stock yard company leased its abattoir to Henry R. Payson and David H. Sherman, two of the defendants, who have since carried on the business under the name of D. H. Sherman & Co. The defendant, Isaac Freese, who was in the employ of the stock yard company as superintendent, and continued in the employ of D. H. Sherman & Co. in the like capacity, entered into partnership with the defendant, Craven, who was also in the employ of the stock yard company at the making of its lease to the complainant, and with the defendant, Sherman, under the name of "The Bergen Manufacturing Company," for the purpose of manufacturing albumen and fertilizers.

After January 9th, 1871, the complainant demanded all the blood of the animals slaughtered at the abattoir, but Craven made an arrangement with certain butchers who slaughtered there, for saving and taking the blood of the animals slaughtered by them, and this was permitted by Sherman & Co., and Freese, their superintendent; and a large part of the blood is thus taken and delivered to Sherman, Freese, and Craven, and is lost to the complainant.

By the record of the lease to the complainant, Sherman, Craven, and Freese had constructive notice of its contents, and also it is clear that they, as well as Payson, had actual notice. They do not deny this, but take the ground that the blood, like all other parts of the animal slaughtered, belongs to the butcher, and that they or the stock yard company, can no more control or deliver it than they could control the flesh or hides. That the butchers having discovered that the blood has

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a merchantable value, have a right to dispose of it for their own benefit; and that when they had determined to sell it, and not to abandon it, Craven was under no obligation not to buy it, and his firm might receive it through him without breach of faith.

This defence, at first sight, is seemingly good; but it wholly rests upon the correctness of the premises, to wit, that the stock yard company had not the right or power to control the disposition of the blood. It is not claimed that it had, before the complainant's lease, granted to any one the privilege of slaughtering there. If it had, for a term unexpired, it would have lost the control. Before that, they had permitted butchers to slaughter there without any provision about disposing of the blood or offal. It may, by custom, have been the effect of such contract, that the butcher might leave the blood and offal to be removed by the company. If left, the company was liable for any nuisance occasioned by it. It cannot be doubted that the company could have required, as a condition, that the butchers should remove the blood and offal. It had the right to prevent any one from using the abattoir who would not comply. Before the lease to the complainant, this condition would have been deemed a burden on the butchers, and might have injured the business of the company. It was in difficulty by reason of the nuisance caused by leaving these matters, and the injunction growing out of it. It was relieved by this lease. The consideration was the exclusive right to take the blood and offal which was secured by covenant to the complainant. After that, the company had the same right to demand of every one using the abattoir that he should leave these matters for the complainant, as it had to require him to remove them. This could have been annexed as a condition to every permission to use the abattoir, as well as the condition to pay for the use. And this, by its covenant, the company was bound to do. *De H. Sherman & Co., as the lessees, are bound by the same covenant. And Freese, Craven, and Sherman having notice of this obligation before they commenced their business, are*

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bound to refrain from interfering with these rights of the complainant, and from taking the blood and other matters which it is entitled to take. *Tulk v. Moxhay*, 2 Phil. 774; *De Mattos v. Gibson*, 4 DeG. & Jones 276.

The facts that Freese and Craven transferred to the complainant their claim to a patent for making albumen from blood, and took part in the arrangements for the lease by the company in whose employ they were, and that Craven interfered by these negotiations with the butchers after he was repulsed in his attempt to get into the employ of the complainant, do not give greater validity to the complainant's right; they may show bad faith and vindictiveness, and that they are not entitled to any favorable consideration beyond their legal rights.

The injunction applied for is not a mandatory injunction; it is not to require the delivery of the blood, but to restrain Craven from taking it, and the other defendants from suffering or permitting any other person than the complainant to take it.

For this injury there is a remedy at law, but it is not an adequate remedy. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion. And redress at law could only be obtained by a continued series of suits through the twenty or forty years of the complainant's term. It is a case peculiarly proper for the preventive remedy by injunction. *Shreve v. Black*, 3 Green's Ch. 177.

The defendants, in their answers, deny that the seal of the stock yard company was affixed to the lease by authority of the directors. The bill alleges that the stock yard company made and executed the lease under its corporate seal and sets out a lease with the seal affixed, and signed by the president. The answer of the company is not verified by any one who has knowledge of the facts. The present secretary swears that he believes the facts to be true. Any deed of corporation, under its corporate seal and signed by the prop-

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officer, is presumed to have been executed by authority of the corporation, until the contrary is clearly shown. *Leggett v. N.J. Man. & Bank'g Co., Saxt.* 541. There is no proof here to overcome this presumption.

The injunction must issue as prayed for.

STEARNS vs. STEARNS.

1. A sworn answer, directly responsive to the charge on which the equity of the bill depends, and of a fact within the personal knowledge of the defendant, must prevail against the uncorroborated testimony of the complainant.

2. A recital in a deed of a consideration, and that it was paid, does not estop the grantor from showing that some other or additional consideration was agreed to be paid; but such recital, under seal, in a solemn instrument, cannot be overcome except by clear, strong evidence against it.

This cause came on for final hearing on bill, answer, and proofs.

Mr. T. Runyon and Mr. Stone, for complainant.

Mr. R. S. Green and Mr. C. Parker, for defendants.

THE CHANCELLOR.

The suit is to compel the defendants to pay and secure an annuity of \$1500, yearly. The complainant alleges that the defendants agreed to pay and secure to her this annuity as the consideration of her joining with her husband, Eckley N. Stearns, since deceased, in conveying to them the one-half of the real estate of his deceased brother, Josiah O. Stearns, in Hudson county, in this state, and in the state of Pennsylvania, which descended to Eckley N. Stearns, and the defendant, Amos C. Stearns, as heirs-at-law of their brother Josiah. This agreement is alleged to have been made by the defend-

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ants with Eckley N. Stearns before the execution and delivery of the conveyance.

The defendants answer under oath, as required by the bill, and in their answer fully deny the making of any such contract as charged in the bill. This answer is directly responsive to the charge on which the equity depends, and is of fact within the personal knowledge of the defendants.

This responsive answer must be overcome by proof of more than one witness, or by the evidence of one witness, corroborated by other proof of like value. There is no direct proof whatever to overcome or contradict it; there is no witness who claims to have been present at the making of any such contract. The only proof is the evidence of Mr. E. G. Brown who had a conversation with one of the defendants, in which he stated that such agreement had been made. But even this witness states that the conversation might have been about an annuity to be secured by complainant's husband by will. There is nothing whatever in the case to strengthen or support this evidence, and the rule of equity, as to the effect of the answer, must prevail.

In this case both deeds state the consideration, and that it was paid; and although this does not estop the grantors from showing that some other or additional consideration was agreed to be paid, such recital, under seal, in a solemn instrument, cannot be overcome except by clear, strong evidence against it. In this case the evidence is very conflicting, and the witnesses for the defendants are most in number, and without the rule as to the effect of the answer, it would be hardly sufficient to overcome the recital in the deed.

The bill must be dismissed, but without costs, as it was filed under circumstances to show not only that it was in good faith but warranted by circumstances, and that the complainant in the transaction has been, without compensation, deprived of real rights.

Linn v. Neldon's Administrator.

LINN vs. NELDON'S ADMINISTRATOR.

in a suit upon an instrument as follows: "Borrowed and received of N., \$5000 in seven and three-tenth treasury notes, which we promise to return on demand, with all interest due thereon," against the maker and surety, the defence that the bonds were sold and the proceeds accounted to the lender, is a defence to the undertaking, not in discharge of the same. It is not an equitable defence, but a strictly legal one, and a court is the proper tribunal for its trial.

The fact that the rules of evidence will not permit the surety, at law, to rely on himself as the only existing proof of his defence, will not entitle him to relief in equity.

is a motion to dissolve injunction for want of equity in the original and affidavit, upon which it was granted.

v. McCarter, for motion.

v. Linn, contra.

THE CHANCELLOR.

The complainant, as surety for George Neldon, signed with him a written undertaking to Susan M. Neldon, the defendant-intestate, and the mother of George, of the following tenor: "\$5000. Borrowed and received of Susan M. Neldon, five thousand dollars, in seven and three-tenth treasury notes, which we promise to return, on demand, with interest due thereon. First issue, February 15th, 1867. George Neldon. Edward A. Linn."

On the 7th of January, 1871, Susan M. Neldon served on the defendant a written notice requiring him to return these notes, and in April, 1871, commenced a suit at law against him and George Neldon, on their written undertaking. In this suit the defendant pleaded, and George Neldon suffered judgment by default. After issue joined Susan M. Neldon died, and her administrator was substituted as plaintiff, and noticed the case for trial.

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The bill filed in this suit alleges that some time in November, 1869, George Neldon and Susan M. Neldon made a new agreement respecting these treasury notes, by which George, with her consent, sold these notes and accounted to her for the proceeds; that the complainant was no party to, and had no notice of said new arrangement, until George Neldon applied to him to aid him in effecting the sale of these treasury notes, which he did at the request of George. The bill alleges, that by the death of Susan M. Neldon and the substitution of her administrator as plaintiff in the suit at law, the complainant is deprived of her evidence and that of George Neldon to sustain these facts, which constitute his defence, and cannot be sworn as a witness himself in that suit.

The affidavit annexed to the bill is that of the complainant, and does not show, except by what he heard from George Neldon, that Susan M. Neldon assented to or knew of the sale of these treasury notes. And it does not show, even by hearsay, that the proceeds of these notes were ever paid or accounted for to her. The endorsement on the undertaking, dated February 15th, 1867, of the payment of \$500, the "premium on the within bonds which were sold this date," would indicate that the bonds were sold on the day they were borrowed, and that the intention of the undertaking was what is usual in such cases, to secure the return, not of the same, but of like bonds.

The fact that these bonds were sold by her son, by the consent and direction of Mrs. Neldon, and the proceeds accounted for to her, is a discharge or fulfillment of the undertaking both on the part of her son and of Linn. It is a full defence at law, and can be taken advantage of there as well as in equity, and a court of law is the most proper tribunal for the trial of this defence. This defence is to the undertaking, not in discharge of the surety. It is not an equitable defence in any way or sense, but strictly a legal one.

Formerly, the discharge of a surety by giving time to the principal, could only be taken advantage of in equity; it is now an equitable defence only. And although long since it

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allowed as a defence at law, yet courts of equity will still grant relief on that ground, upon the principle that equity jurisdiction is not taken away on matters over which it was once clearly established, by the fact that by statute, or the change of practice in the law courts, relief can be had in them. But the defence of the complainant here was never an equitable defence—it always was strictly a legal defence.

Nor can the fact that the rules of evidence will not permit him, at law, to avail himself of the only existing proof of his defence, entitle him to relief in equity. No such principle has ever been established in courts of equity. In many cases a bill of discovery will be entertained in aid of a suit at law, and the proceedings at law restrained until discovery. But the bill in this case is not for discovery; it does not allege that the administrator has any knowledge of the facts constituting the defence.

Besides, there is no proof of the fact upon which the defence depends in the affidavit annexed to the bill. The only allegation is upon hearsay. And there are no facts or circumstances proved to support the allegation or make it probable.

The injunction must be dissolved.

 CAMDEN MUTUAL INSURANCE ASSOCIATION vs. JONES
and others.

1. An ante-nuptial contract to release or not to claim dower, in consideration of an annuity or a provision out of personal property covenanted to be provided in lieu of it, will not bar the claim of dower if the provision on part of the husband fails.
2. In such case the widow can elect to rescind the contract and claim her dower, but she cannot have both. And having put in her claim against her husband's estate—who had died insolvent—under the covenant to secure her annuity, and having accepted her *pro rata* share of the estate for it, she is barred from claiming dower.
3. An administrator of an intestate who owned the equity of redemption in lands sold under a decree for foreclosure, who is decreed to be entitled to the surplus after satisfying the mortgage, for the payment of

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the intestate's debts, must execute a bond, with sufficient sureties and with condition as required by the statute in the case of lands sold by the order of the Orphans Court.

On exceptions of Sarah A. Jones to the report of master as to surplus moneys arising from sale of mortgaged premises on a decree of foreclosure.

Mr. S. M. Dickinson, for exceptant.

Mr. P. L. Voorhees, for administrator.

THE CHANCELLOR.

Lands in Camden were sold by the sheriff of that county, by execution on a decree in this cause for the foreclosure and sale of the same, to satisfy a mortgage held by the complainants. The surplus of \$1848.37 was deposited by the sheriff with the clerk. The equity of redemption in the lands sold belonged to Andrew J. Jones, since deceased. His administrator in this state, David Fleming, filed a petition for this money as necessary for the payment of his debts. His widow, Sarah A. Jones, claims that she is entitled to dower out of it. The master has reported that the administrator is entitled to this fund, and that the widow has no claim for dower. To this report the widow excepts.

Andrew J. Jones, the intestate, resided in Pennsylvania. He made an ante-nuptial contract with Sarah A. Jones, now his widow, by which he agreed to settle upon and secure to her, in case she survived him, an annuity of \$1500 during her widowhood, and of \$500 after re-marriage; and also agreed that she should have entire control and disposition of all her own estate during the marriage, and by will at her death. In consideration of which she released him, his heirs, executors, and administrators from all claims of dower or otherwise, that she might be entitled to after his decease, and she accepted that provision as a full satisfaction of all claims out of his estate, in case she should become his wife and survive him.

Camden Mutual Insurance Association v. Jones.

Jones died insolvent. Fleming and A. J. Jones, Junior, administered in Pennsylvania. The widow put in her claim against the estate on account of the covenant to secure her annuities, for which the proper court there awarded her the sum of \$7952.96, as the value of her annuities; on that account her *pro rata* dividend out of the estate was settled at \$606.32, which was paid to and accepted by her.

The questions are, did this ante-nuptial contract not performed, bar her dower, and if it did not, did her claim in Pennsylvania, and her acceptance of a dividend, ratify and confirm the contract on her part, if she otherwise could have rescinded it.

It seems settled, both upon principle and by authority, that an ante-nuptial contract to release or not to claim dower, in consideration of an annuity or a provision out of personal property covenanted to be provided in lieu of it, will not bar the claim of dower if the provision on part of the husband fails. 1 *Greenl. Cruise, Tit. 6, Dower, ch. 4, § 17*; *Hastings v. Dickenson*, 7 *Mass.* 153; *Gibson v. Gibson*, 15 *Mass.* 110.

In such case the widow can elect to rescind the contract and claim her dower, but she cannot have both. Here she has elected to claim the annuity and has accepted her *pro rata* share of the estate for it. Her election was wise; she received four times the amount that could be awarded her for dower out of the fund in this court. The property in Camden county was conveyed to Jones subject to the mortgage, and her right to dower was only in the equity of redemption represented by the fund in court.

The exception must be overruled, and the money in court paid to the administrator. But he must execute a bond with sufficient sureties, and with condition as required by the statute in the case of lands sold by the order of the Orphans Court. The bond given on the grant of administration, though otherwise sufficient by the terms of the condition, is only for the faithful administration of the personal estate of the intestate. The sureties could not be held for the failure to administer the proceeds of the sale of his real estate.

Bennett v. Hadsell.

Dunnell v. Henderson.

BENNETT vs. HADSELL.

1. The mortgage being given for \$800, when, by agreement, on was advanced, is usurious. The amount actually advanced only recovered, without interest or costs.

2. The assignee, even without notice of usury, takes subject to defence.

Submitted on written briefs, upon pleadings and pro

Mr. T. S. Mitchell, for complainant.

Mr. F. F. Westcott, for defendant.

THE CHANCELLOR.

The evidence in this case shows clearly that Hadsell agreed to pay C. H. Bennett \$100 for his services in getting money for which the mortgage was given. C. H. Bennett advanced the money himself, the mortgage was given to him and he retained \$100 of the \$800, for which the mortgage was given. This is usury. The assignee, even without notice of the usury, takes subject to that defence.

Let there be a decree for \$700, without interest or costs.

DUNNELL vs. HENDERSON.

1. An entry made by one partner on the books of the firm during the partnership, will, after its termination, be evidence against the other partner, if he at the time knew of the entry, or had an opportunity to examine the books and did not dissent from it.

2. If one partner agrees to contribute the stock on hand in his business and the other assets of that business, against a specified sum to be contributed by the other partner, this stock and assets, and that only, must be taken as his capital in the concern, whether it exceeds or falls short of the amount stipulated by the other partner.

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3. A new foundation for a new engine put in a mill in place of an old one discarded, built for it because the foundation of the old engine, if repaired, was not sufficient for the new engine, must be considered as an addition and not as repairs under articles distinguishing additions from repairs.

4. It must appear from the master's report and the proofs and documents accompanying it, that exceptions which would be valid if true, are founded on fact.

The argument in this case was upon exceptions to the report of the master, stating the accounts between the parties.

Mr. C. Parker, for exceptant.

Mr. T. Runyon, for defendant.

THE CHANCELLOR.

The master's report is a statement of the accounts between the defendants, who were partners, under the name of A. L. Dunnell & Co. The partnership was entered into January 1st, 1852, was dissolved by mutual consent on the 25th of May of that year, and again renewed on the 29th of August, 1853, and finally dissolved September 28th, 1855. The business of the firm was the manufacture of paper, in which Dunnell had been engaged for years. It was to be carried on at the works and establishment owned by Dunnell, who was to superintend the manufacture. Henderson was to attend to the financial matters.

By the original articles, the defendant was to contribute \$5000 of capital. The complainant was to furnish the use of his mill and machinery, and also the paper and stock on hand at cost. And this \$5000 furnished by the defendant, and the paper and stock of the complainant on hand, was to constitute the joint capital in the business. All expenses of manufacturing, repairs to machinery, new machinery and fixtures, to supply the place of any worn out, and other incidental expenses, were to be paid from the profits, but additions to the mill and machinery were to be paid for by the complainant. The complainant was to receive \$1500 yearly for the use of

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his mill and machinery, the legal interest on all moneys furnished, and \$624 yearly for his services. The defendant was to receive legal interest on the money he might furnish, and \$312 yearly for his services. The balance of the profits was to be divided equally.

The defendant contributed his \$5000 in notes, which were immediately endorsed over and paid by the complainant to M. H. Woodruff, in payment of a debt of the complainant to him for money before advanced to and used by the complainant in his business. The complainant also used other assets of the firm to pay his individual liabilities, which induced the defendant to ask for and the complainant to give to defendant a mortgage for \$5000 as security for his capital advanced to the partnership. This mortgage was given and dated on the 12th day of February, 1852, in pursuance of a provision in the articles requiring security from either partner, who should draw out more than his share of the profits.

After the dissolution of May 25th, 1852, the defendant continued in the employ of the complainant as book-keeper, or confidential adviser, at a yearly salary of \$500, until the renewal of the partnership. The articles for renewal, dated August 29th, 1853, provided that the partnership should be continued to January 1st, 1857, and that its affairs should be settled from the commencement of the partnership, as if no dissolution had taken place. That the contribution should be the same as stipulated in the original articles, and that the partnership should be carried on under the original stipulations, except that the yearly rent to be paid should be only \$1000 instead of \$1500. The complainant agreed to put in the mill a new paper and drying machine and two new engines, and while these were in use the rent was to be again \$1500; and until then, complainant was to be allowed six per cent. interest on the cost of a new wheel-house, machine-wheel, and cylinder, that had been put in by him.

Before noticing the exceptions I will state my view of the effect of these articles as to the capital to be contributed by each partner. It is clear that the defendant was to contribut—

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\$5000. The complainant was to contribute the stock and paper on hand. There is nothing in the articles or otherwise, before me, to show that he guaranteed that these should be of the value of \$5000, or any other value. If they were worth only \$50, that was all that he was required to contribute; if they were worth, as he is said to have represented them to be, twice the defendant's contribution, he was bound to put them in as his part of the capital. The paper and stock were to be put in as they existed, however depreciated, but on the other hand free from all liens or debts of the complainant, and were to be put in, if required, at the place of business of the firm, without charge for transportation.

The value put upon this stock and paper by the master is \$7055.30, as appears by Schedule A, of which the first two items are debts, not stock. This is the amount which the articles required the complainant to furnish toward the capital and to keep in the capital. The first exception is to the value put on this stock by the master; he valued it at \$85 per ton, as credited to the complainant by the defendant in the books of the firm. For the reasons given by the master, I am satisfied that this credit is correct. The books were kept by the defendant in the factory, and were open to the inspection of the complainant, as provided in the articles of partnership. It is not positively shown that he did examine them, but he could have done it. The rule is, that in such case the books are evidence against him of the entries. The price was entered as that at which the articles were put in. 2 *Phill. Ev.* 680; *Heartt v. Corning*, 3 *Paige* 566; *Caldwell v. Leiber*, 7 *Paige* 507; *United States Bank v. Binney*, 5 *Mason* 188.

Besides, in this case, after the first dissolution these books, with these entries in them, were kept for more than a year as the individual books of the complainant. He must be presumed, then, to have known their contents at the renewal of the partnership. If they were to be put in at the price claimed by the complainant, it would amount to over \$10,000

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his valuation being \$126 per ton, and exceeding the entry by nearly fifty per cent.

The liens upon the goods in the hands of factors, and the cost of transportation, together with all debts paid for Dunnell, were rightly charged by the master to him. And if these, as stated by the master, reduced the value of the stock when received, the deficiency to be charged to Dunnell would be what the net value, \$2486.82, fell short of the \$5000 contributed by defendant and appropriated by Dunnell, making the sum of \$2513.18, as charged by the master.

The third exception is to a charge entered on the partnership books May 5th, 1852, in the usual course of business, and for the reasons above stated must be presumed to be right until proved to be erroneous. Of this I find no evidence.

The fourth exception, so far as regards freight, comes within the grounds stated for overruling the first and second, and it nowhere appears that the residue of the charge was for the value of paper. The books do not so state it. The value of the paper in Schedule A is more than double this charge.

The fifth exception is to seventy-four items, particularly specified in it, which it alleges the master has improperly charged against the complainant. I cannot discover, from the master's report or schedules, whether any of them were charged by him against the complainant, except those contained in the sixteenth item of the bill of particulars, annexed to the report. I am satisfied that the foundation in the new engine ought to be considered as part of the new engine; that a new foundation was required; that the old one repaired would not have answered for the new engine. These items are, therefore, properly charged to Dunnell. As to the other items in that exception, it may be possible for an expert accountant, by going through the books for that year, to find them, and to show that these are part of the cash included in the cash charge in the master's schedule. As the case is before me, I must hold the exception as to them not to be sustained.

The sixth exception regards the rent credited October 1st—

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1856. There is no such credit. If it is intended to be the rent credited September 28th, 1855, the exception depends upon the time during which the new paper and drying machine and the new engines, had been in use in the mill. If they had been in use for the whole of that year, the credit should have been at the rate of \$1500 per annum, or \$1112, not \$1391, as claimed. But it nowhere appears that they had been completed and in use from January 1st, 1855, and therefore no error appears in the master's account.

The item of \$506.12, or Lyon's bill for repairs to boiler, in the seventh exception, was for work done after the final dissolution of the partnership, and ought not to be allowed; the partnership took the mill as it was, and were not bound to leave it in good repair. It does not appear that the other items excepted to were allowed by the master, and if they were the evidence does not show them erroneous.

The remaining exceptions seem to be a presentation of the same grounds that I have considered, in a new form, except the division of \$10,000 as profits, which was not before presented. The evidence is, that there were profits, and the result of the account, as stated by the master in schedule, shows that there must have been profits. Each partner had been credited with the capital contributed, and had drawn it out in full; each had also been credited with \$5000 profits. The amount then due from Dunnell added to the amounts afterwards paid out for him, and the assets on hand and collected, seem to be sufficient to pay the amount due to Henderson, so that if Dunnell is able to pay his indebtedness the firm would be solvent.

But if no profits had been earned, as all the capital had been repaid, this error would make no difference in the result; if that allowance were deducted from both accounts it would make Dunnell's debt \$5000 more than stated, or \$7897.73, and Henderson's credit \$5000 less, or \$953.98, and these, added and divided equally, would make the debt of the complainant to the defendant, on November 8th, 1855, \$4425.86, precisely as in the master's report.

The exceptions must all be overruled.

Evans v. Evans.

JACOB L. EVANS vs. WILLIAM B. EVANS and SAMUEL B. EVANS.

WILLIAM B. EVANS and SAMUEL B. EVANS vs. JACOB L. EVANS.

Where the chief matter in controversy in two suits between the same parties is the same, and if that was settled there would be no substantial difference between the parties, and no possible injury can result, an order will be made that the testimony taken in either suit may be used in the other, and that the hearing of both shall come on together.

On motion on behalf of William B. Evans and Samuel B. Evans, that the evidence taken in either one of these suits may be used on the hearing of the other, and that the two suits may be heard together.

Mr. F. Voorhees, for motion.

Mr. Merritt, contra.

THE CHANCELLOR.

The parties are all executors of the will of their father, Thomas Evans, deceased. The controversy in both suits arises out of the will of their testator, and the chief, if not the only matter in controversy in both suits, is the same. The dispute is, whether the testator had, in his lifetime, given to his son Jacob, with whom he resided, the stock and implements on his farm. If that question was settled, there would be no substantial difference between the parties.

Courts of equity have, in the exercise of their discretion, gone far in making orders respecting the conduct of suits situated like these, for the purpose of shortening litigation, and putting an end to expense. I see no possible injury that can result to either party from the order applied for. The parties being the same in both suits, each will have the full—

Pond v. Causdell.

benefit of cross-examination of the witnesses of the other, and both will be fully heard upon every question in each suit at the final hearing.

An order that the testimony taken in either suit may be used in the other, and that the hearing of both should come on together, must be made.

POND vs. CAUSDELL.

1. In a suit to foreclose a mortgage whereon, at the making of the loan, twelve per cent. interest was demanded, and agreed to be paid, and at the expiration of the first six months, interest at that rate was paid and received as the interest for that time, the principal only, less the excess of the amount so paid above the legal interest, can be recovered, and that without interest or costs of suit.

2. The mortgagee is bound to pay the tax on his mortgage, and cannot recover it of the mortgagor.

This case was submitted without argument, upon pleadings and proofs.

THE CHANCELLOR.

The bill is to foreclose a mortgage for \$2500. The answer admits the loan and mortgage, but sets up that at the making of the loan, interest at the rate of twelve per cent. per annum was demanded and agreed to be paid, and that at the expiration of the first six months \$150 was paid and received as the interest for that time. This defence is fully proved. The complainant can only recover the principal, less \$62.50, the excess of the \$150 paid above the legal interest, and that without interest or costs of suit. A collector's receipt for the taxes paid by the complainant on the mortgage, is offered in evidence and handed up with the papers. I cannot conceive for what purpose. The complainant is bound to pay the tax upon this mortgage, as well as upon his other property, and there is no obligation in law upon the defendant to repay it.

 Jobbins v. Montague and Albertson.

Had she paid it, the amount, like any other illegal premium, must have been deducted from the principal, but I find no evidence that she has paid it.

Let there be a decree in favor of the complainant for \$2437.50, principal, without interest or costs.

JOBBINS vs. MONTAGUE and ALBERTSON.

1. Bill by assignee in bankruptcy, to have a deed given by the bankrupt to A., declared void, and the true amount due on a mortgage given by him to M., alleged to be fraudulent, ascertained; and that the complainant may be allowed to redeem, or the mortgagee be decreed to assign, upon payment of that amount to him; and that the decree obtained in a foreclosure suit upon the mortgage, may be opened, and the sale under the execution issued in it stayed by injunction. The court held that the injunction which had issued upon filing the bill must be dissolved at the end of thirty days, unless the mortgagee should, within that time, on tender of the amount of his debt, interest, and costs, refuse to assign his mortgage, decree, and execution to the complainant; or, if he is not provided with funds to redeem, he may, at his election, have the injunction dissolved as to the sale, and have an order to compel the sheriff to pay all the proceeds of the sale, above the debts and costs of M., into court, to be disposed of on application for surplus moneys.

2. A. not having answered, the allegations in the bill were held sufficient to sustain an injunction against paying over any of the proceeds of sale to him.

On motion to dissolve injunction, made upon bill and answer.

Mr. Pullney, (of New York,) for motion.

Mr. Dixon, contra.

THE CHANCELLOR.

The complainant is the assignee in bankruptcy of I. P. Browner & Co., appointed by the District Court for the Southern District of New York, on application of a creditor.

Jobbins v. Montague and Albertson.

on petition filed January 13th, 1870. Townsend Jackson, one of the firm, had owned real estate in Hudson county, in this state. This, on the 15th of June, 1869, he had mortgaged to the defendant, Montague, for \$10,000, and on the 24th of November in that year, had conveyed to the defendant, Albertson, subject to that mortgage. The complainant was appointed assignee on the 18th of February, 1870, and the bankrupts' assignment of all their estate to him was recorded in the Hudson county clerk's office, June 24th, 1870.

Montague filed a bill in this court to foreclose his mortgage October 17th, 1870, and made Jackson and Albertson parties, but did not make the complainant, the assignee in bankruptcy, a party.

An order was made in the United States District Court in New York, on the suit of Jobbins as assignee, against Albertson and others, appointing Jobbins receiver of this real estate in New Jersey. This order was served upon Montague October 11th, 1870, six days before his bill of foreclosure was filed. The final decree in the foreclosure suit was made February 17th, 1871, for sale for payment of \$10,791, then due on the mortgage, with costs.

The bill in this case alleges that the mortgage to Montague is fraudulent, that it was given without consideration, in part or in whole, and that the deed to Albertson was given when the firm was insolvent, and the insolvency known to Albertson, and is without consideration. It prays that the deed to Albertson may be declared void; that the true amount due on the mortgage to Montague may be ascertained, and that the complainant may be allowed to redeem or Montague be decreed to assign upon payment of that amount to him; and that for this purpose the decree in the foreclosure suit may be opened, and the sale under the execution issued in it stayed by injunction.

The answer of Montague is full upon all the charges against him and his mortgage. It alleges that the mortgage was given for cash loaned, and actually advanced, six months before the filing of the petition in bankruptcy, and without any knowl-

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edge or suspicion that Jackson or the firm were then insolvent or embarrassed, and that they were, in fact, at that time, perfectly solvent; and denies all knowledge of any fraud in the deed to Albertson.

In the foreclosure suit, all persons appearing at the time to be necessary parties, were made defendants. The deed to Albertson, if given *bona fide*, without notice of Jackson's insolvency, and for a consideration, is valid. Albertson was the apparent owner, and would remain so, until the conveyance to him was adjudged invalid. The appointment of a receiver by a court having no jurisdiction of the property, could not affect the title; it would not, if appointed by a court having such jurisdiction.

In the case as it now stands before me by the answer, Montague appears to have a valid mortgage made in good faith for a full consideration, and a decree of foreclosure regularly obtained and an execution for the sale of the premises. There is a controversy between Jobbins, the assignee, and the defendant, Albertson, as to the validity of the conveyance to Albertson. Montague ought not to be compelled to wait until that controversy is settled before he realizes the debt due to him. He answers that he is willing to transfer and assign the mortgage to Jobbins, the assignee, upon being paid his debt and costs. This is all that the complainant is entitled to, if his bill be treated as a bill to redeem. Or if he is not provided with funds to redeem, he may, at his election, have the injunction dissolved as to the sale, and have an order to compel the sheriff to pay all the proceeds of the sale, above the debts and costs of Montague, into court, to be disposed of on application for surplus moneys. The defendant, Albertson, has not answered, and the allegations in the bill are sufficient to sustain an injunction against paying over any of the proceeds of the sale to him.

The injunction must be dissolved at the end of thirty days, unless Montague shall, within that time, on tender of the amount of his debt, interest, and costs, refuse to assign his mortgage, decree, and execution to Jobbins.

Selah v. Selah.

SELAH vs. SELAH.

1. This court has the power to declare a contract of marriage void, when entered into under circumstances that make such contract invalid.
2. When a marriage is sought to be declared void on the ground of the party's intoxication at the time of the ceremony, and that it was not consummated by cohabitation, the proceeding must be by bill, and not by petition.
3. Where the marriage is not one declared originally void by the statute, and the case is one which cannot be considered within its provisions, as included in the term void, the suit must be by bill.
4. Where the object of the suit is to declare a marriage contract void, for some cause not provided for in the act, the provision that the defendant shall not answer under oath, does not apply.

On petition for divorce, and master's report upon reference.

Mr. Hugg, for petitioner.

THE CHANCELLOR.

The object of the petitioner is to have a marriage, by a ceremony gone through when the petitioner was so much intoxicated that he did not comprehend what was taking place, and not consummated or followed by cohabitation, declared void.

In the case of *McClurg v. Terry*, 6 C. E. Green 225, it was held that this court has the power not only to dissolve legal contracts, which is the proper meaning of the word divorce, as used in the Constitution and statutes on the subject, but also to declare contracts of marriage void when entered into under circumstances that make such contracts invalid. The present case is not one of those enumerated in the statute where the contract is originally void, and cannot be considered within its provisions concerning divorces, as included in that term.

In *McClurg v. Terry*, the power to decree a marriage void was held to be in this court, because it was analogous to the

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power of divorce vested in it by statute, and if not in this court it exists nowhere. But it cannot be held to be included in the provisions of the divorce act authorizing proceedings by petition. Nor does the decision in that case hold that this court has power to dissolve a marriage actually entered into, but only that it has power to declare that such contract was never legally made. The proceeding in such case must be according to the established practice of the court—by bill. And for the same reason, the provision that the defendant shall not answer under oath, should not apply to cases like this, where the object is to declare the marriage void for some cause not provided for in the act.

PARKER vs. HAYES.

1. A commissioner appointed under the act of March 17th, 1862, has ~~no~~ power to adjourn the examination, but only to continue it when once commenced, from day to day, while actually proceeding with the examination of witnesses.

2. No notice having been given of the time and place of taking depositions, they must be suppressed. The adjournment does not supply the place of the notice required by the statute.

This was on motion to suppress depositions filed in this cause, taken on part of the defendant, at Rockford, Illinois, before a commissioner appointed under the act of March 17th, 1862.

Mr. Ransom, for motion.

Mr. C. Parker, contra.

THE CHANCELLOR.

The notice of taking the depositions, which was in proper form, and duly served, was to take the depositions at Rockford, April 27th, 1871. The complainant appeared by an

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counsel. The commissioner, for his own convenience, turned the taking testimony to May 2d, at which complainant appeared as before, when the commission adjourned proceedings until May 19th, for the next day. At neither of these meetings was any witness present; nor did the complainant consent to the adjournment. After the last adjournment, the agent of the complainant, who was from New Jersey, returned home, and did not, and the complainant's counsel, again attend before the commissioner.

One witness was examined on the 19th, one on the 22d, and one on the 23d of May, and the 20th of June.

The statute requires notice of the time and place of taking depositions to be served on the opposite party. For the time of service would be about twenty days. Notice was given of the time and place of the actual taking of these depositions, and the question presented is, whether the adjournment of the matter by the commissioner supersedes the giving of such notice. The statute provides for no adjournment, and the power of keeping a party or his agent a thousand miles from home for fifty days, to attend at the pleasure of a commissioner at his pleasure, under the pretense of abandoning his case to strangers, is too oppressive to be sustained without clear authority. There is no express provision in the act, and I find no principle of law, or any analogous cases, to sustain it. The commissioner is not a court or judicial officer, and has given to him no discretionary power. And even the courts of law in this state frequently adjourn from day to day, until power was given to adjourn over. I know no reason why a greater power should be given to this commissioner by the mere fact of his appointment. This statute creates a new power, contrary to settled practice, and should, therefore, be strictly construed and strictly complied with. In case of commissions, compliance has always been required.

The members of this court have, in this state, power to refer cases on them by the rules, subject to the limita-

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tions there fixed. Before the regulation by the rules, it was customary for examiners to adjourn, but generally by consent of parties, and no case in which it was done without such consent was ever brought before the court to test the power.

I think, both upon principle and as a matter of expediency, it must be held that such commissioner has no power to adjourn, but only to continue the examination when once commenced, from day to day, while actually proceeding with the examination of witnesses.

I am of opinion that the depositions must be suppressed.

 MOUNT vs. POTTS and others.

1. The rule in equity is well established, that where mortgaged premises are sold in separate parcels successively to different purchasers, with covenants against encumbrances, the parcels are liable to payment in the inverse order of their sale.

2. A release of any of the parcels of the mortgaged premises successively sold, from the mortgage, not only frees that parcel entirely from the lien, but also frees the parcel sold before it, or so much of that parcel as the parcel released would have satisfied if not released. And the mortgagee cannot, by a release, or any act of his, change the right of the purchaser of any of the parcels to have every parcel subsequently sold or its value first appropriated to the payment.

3. Where, after a sale of the mortgaged premises in successive parcels, the purchaser of the parcel first sold gives another mortgage on that parcel, such second mortgage cannot be decreed, at the instance of the owners of the third and fourth parcels, in a suit to foreclose the first mortgage covering the whole tract, to be paid by the mortgagee holding such second mortgage, on the ground of its being a personal obligation.

4. No positive relief, in adjusting equities between defendants, can be decreed or granted to one defendant against another, except such as can be granted incidentally to the relief sought by the complainant.

Argued on final hearing, upon bill, answers, and proofs.

Mr. J. Wilson, for defendant Warwick.

Mr. A. V. Schenck, for defendants Potts and Murphy.

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suit is for foreclosure and sale of mortgaged lands. The right of the complainant, or his right to a decree, is not in dispute. The controversy is between the defendants. The mortgage was given by Elias Dye to the complainant. After his death, he sold the premises in four separate parcels, successively, to different purchasers, giving to each a deed with covenants against encumbrances. None of the purchasers knew of this mortgage. The rule in equity is well established in such cases; it is that the parcels are liable in the inverse order of their sale. No parcel is to contribute if those sold after it are sufficient to pay the mortgage.

In this case Mount (the complainant,) released the parcel secondly in order of time from the mortgage. This does not release that parcel entirely from the lien, but also frees the parcel, or so much of it as the second parcel, if not released, would have satisfied. The mortgagee, by a release or part of his, cannot change the right of the purchaser of the parcel to have every parcel subsequently sold, or its value, appropriated to the payment. These positions are not controverted here.

The dispute grows out of a claim of the owners of the third and fourth parcels to have the mortgage paid and satisfied by the defendant, William Warwick, who holds a mortgage for \$1000 on the first parcel, given to him by the defendant, John Stultz, who now owns that parcel. The claim is not against Stultz, or as a lien on that parcel of the land, but as a personal obligation of Warwick. As this suit is for the foreclosure of the complainant's mortgage, and no positive relief can be decreed or granted to one defendant against another, except such as can be granted incidentally to the relief sought by the complainant in adjusting the claims between the defendants, it may be difficult, if not impossible, to give in this suit the relief sought against Warwick.

A decree that he pay the mortgage of the complainant will not be warranted by the facts stated in the bill. The

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complainant, as against the lands, is only entitled to a decree that they may be sold in the order above indicated until enough is raised to pay his mortgage. Unless the three parcels last sold will not satisfy his mortgage, he cannot resort to the parcel of Stultz. Nor could it be sold to pay Warwick's mortgage, except upon Warwick's application. If the first parcel was sold to pay Mount's mortgage, and the surplus was in court, Potts and Murphy might, perhaps, have their equities considered.

But if we put out of consideration these difficulties, the evidence is not sufficient to support the claim of Potts and Murphy against Warwick.

They allege that a mortgage for \$1500, given by John G. Mount to Dye, on the purchase of the first parcel, was assigned by Dye to Warwick for the purpose of paying off the mortgage of the complainant. This is said to have been done in the spring of 1869. The mortgage of Stultz to Warwick was given in December of that year, and the amount of this \$1500 mortgage is included in it. Warwick surrendered it to be canceled at that time.

Warwick does not deny that Dye assigned to him this \$1500 mortgage, but alleges that it was not given to him for the purpose of enabling him to pay off the mortgage of the complainant, but for \$1550 advanced by him to Dye at the assignment, which, he states, was in the beginning of April 1868. The advance he alleges was made by two checks, for \$500 each, and by paying a note of Dye at a bank in Trenton, for \$550. He produces two \$500 checks of that date, endorsed by Dye, and a memorandum check for \$550 to Dye or bearer, by which he alleges the note was taken up. And he testifies that these were the true consideration of the transfer of this mortgage to him, and that it was not transferred in consideration of his paying the complainant's mortgage, and that he never undertook to pay it.

Dye, on the other hand, testifies that it was transferred for that purpose, and that Warwick undertook to pay the complainant. He testifies that the checks produced were included in a mortgage for \$10,000, on the 1st of April, 1869.

Mount v. Potts.

A schedule of the notes for which that mortgage was given is in evidence, and shows that these checks were not included, and that Dye is mistaken as to that point. The mortgage for \$1500 was not, with the interest, sufficient to discharge the mortgage to the complainant and interest, and was not an adequate inducement for Warwick to enter into that undertaking.

Dye was on the eve of bankruptcy, and Warwick took a mortgage for \$10,000 to secure what Dye then owed him, and it was not probable that he would, without security, have undertaken to pay a debt for which he was in no way liable. He had signed, as surety for Dye, a bond to Mrs. Walton, a former owner of the Stultz lot, conditioned that Dye should pay complainant's mortgage, for which he afterwards substituted his own bond with collateral security, with condition to save Mrs. Walton harmless; but he understood at that time that he or the first parcel were in no danger, as the three parcels last sold were abundant.

The only positive testimony on the point in dispute is the evidence of Dye and Warwick. They contradict each other. The testimony of Warwick seems supported by the production of the three checks which he says constituted the consideration of the assignment; that of Dye is weakened by the mistake in testifying that these checks were included in the \$10,000 mortgage, and by his not being able otherwise to account for them.

The defendants, who seek to charge Warwick with the payment of this mortgage, have the burden of proof. He is not bound to pay it, unless he undertook to do it, and received a consideration. And were the testimony evenly balanced, I would not be warranted in putting this burden upon Warwick, especially as the alleged promise is an undertaking to pay the debt of another, and is within the spirit, if not the letter, of the statute of frauds.

The decree must be only for the relief of the complainant, by the sale of the premises in the order mentioned; and no other relief for the defendants, as against each other, can be had in this suit.

Lathrop v. Smalley's Executors.

LATHROP and wife vs. SMALLEY'S EXECUTORS.

1. A *cestui que trust* is entitled to have the interest on the fund held in trust for her paid to her yearly, without any deductions for commissions, until commissions are allowed and settled by the proper court.

2. A trustee who uses the trust fund in his own business, like any other debtor, must seek the *cestui que trust* to pay the interest.

3. A trustee who, contrary to the directions of the will, fails to invest the fund, and in flagrant violation of the trust, uses the money in his own business, is not entitled to commissions.

4. The trustee using the trust fund having retained the interest, must pay interest upon it from the day it became due.

5. A trustee will not be removed for every violation of duty. For acts done in bad faith, or that have diminished or endangered the trust fund without bad faith, it is the duty of the court to remove him.

6. But when it appears that the trustee is a responsible man, of large property, and engaged in no hazardous business, and that the fund has not been in any danger, and that he supposed the money was safe in his hands as in any investment he could make, and that retaining it would save expenses to the fund, his good faith is not impeached, and he will not be removed.

7. Whether a co-trustee who has paid no attention to the fund, but left its administration entirely in the hands of the acting trustee, will be removed, depends upon the conduct of the acting trustee. Under the circumstances of this case, he will not be removed.

8. Vexatious and troublesome conduct on the part of a trustee may be good ground for removing him from the trust, but held insufficient for that purpose in this case.

9. The fund must be invested on bond and mortgage at the highest rate of interest allowed by law, if such investment can be procured, and so not to be subject to taxes if the trustee resides in a part of the state where such exemption exists.

10. Costs to be paid by trustees out of their own estate.

Argued upon final hearing, upon pleadings and proofs.

Mr. A. V. Schenck, for complainant.

Mr. Adrian, for defendants.

Lathrop v. Smalley's Executors.

THE CHANCELLOR.

The complainant, Jane Lathrop, by the will of her father, John A. Smalley, is entitled to the interest of \$2400, which the testator directed his executors to put out and keep at interest for her use and benefit; the interest to be paid to her yearly during her natural life; the principal to be paid to her children after her death. The defendants were appointed executors of the will; they proved it, and assumed its execution. After the settlement of the account of the executors, the amount directed to be invested for Mrs. Lathrop was left in the hands of Abraham Smalley, one of the executors, who was the son of the testator; the other executor, David A. Smalley, who was a brother of the testator, relinquished all charge of it to him, and has not since intermeddled in any way with it.

Abraham Smalley did not invest this money held in trust for Jane Lathrop, but retained it in his own hands, mingled with his own property. He paid Mrs. Lathrop the interest due her to July 20th, 1869. Since which time, more than two years before the filing of the bill, he paid her no interest. He refused to pay it until the amount of commissions, which he claimed out of it, was settled and ascertained, so that he might retain it.

On the 16th of January, 1860, before which there had been disputes and litigation between the parties as to this matter, an agreement was entered into and executed under seal, by which the amount then in the hands of the defendants, in trust for Mrs. Lathrop, on which she was entitled to receive interest, was fixed and settled to be \$1800; this was exclusive of \$600, which was to be added to the fund at the death of her mother, Mary Smalley, which took place in 1866. That agreement contained a provision that the defendants "shall be entitled to claim and shall be allowed all such commissions for taking care of and managing the said trust moneys as the court, before which they may settle their accounts, shall consider that they are entitled, according to law."

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After the death of Mary Smalley, the defendant, Abraham Smalley, exhibited in the Orphans Court of Middlesex county, an account of the sum of \$3000, given by the will in trust for her during her life, and after her death to be divided equally among the five children of the testator. On this, as audited by the surrogate, commissions were allowed. The court, on exceptions, refused to allow either commissions or charges of settling the account, holding that as this was a specific legacy charged upon the real and personal estate of the testator, which was given to the executor and his brothers, and as commissions had been allowed on the whole estate, including this \$3000, they could not be again allowed.

In December, 1870, Abraham Smalley exhibited an account in the Orphans Court of the trust estate in his hands for Jane Lathrop, and in it charged \$77.76 for commissions, at six per cent. on \$1296, the interest which had accrued on these trust moneys since the settlement of July 20th, 1869. To this account the complainant excepted, and no further proceedings appear to have been had in the matter.

The complainant was entitled to have the interest on the sum held in trust for her paid to her yearly, without any deductions for commissions, until commissions had been allowed and settled by the proper court. This is the rule of law without any agreement, and the provision on this point in the agreement above stated, accords with the rule of law. This interest was not paid to her; it was demanded, and payment refused. The question whether in such case a trustee is bound, like a debtor, to seek the *cestui que trust* and tender the interest, or the *cestui que trust* is obliged to call on the trustee, does not arise in this case. An actual demand has been proved. And besides that, in this case the trustee having used the money himself, owes the interest, and, like any other debtor, must seek his creditor and offer payment. The complainants are entitled to maintain this suit for the interest in arrear.

The claim of the defendant for commissions is properly before this court for determination. He clearly was not en-

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titled to commissions on the principal, as held by the Orphans Court. But the claim for commissions on the interest is not within the principle of that decision. As a trustee holding a fund to be invested, in trust to collect and pay over the interest to the complainant, I am of opinion that he would be entitled to commissions if he had performed his trust. But he has not performed the trust. Contrary to the express directions of the will, he has not put out and kept at interest the principal, but in flagrant violation of his trust, has used the money in his own business, without any security given for it. Nor has he paid the interest yearly, but on a petty question in dispute, whether he should be allowed his commissions yearly, he has kept from the *cestui que trust* the whole income, it may be to her great annoyance.

The settled rule is, that no commissions will be allowed a trustee guilty of such a breach of trust. It was so held in the case of *McKnight's Ex'rs v. Walsh*, *ante p.* 136, upon the authorities cited in the opinion. In that case McKnight, though he retained the money, had placed in the hands of a person selected by the father of the infant *cestui que trust* as security, an amount of stock unquestionably sufficient. But he was held not to be entitled to commissions, on the ground of breach of trust by not investing the moneys; and also on another ground, which exists in this case, that he had done nothing as trustee to earn commissions. He retained the trust fund in his own hands, and when he paid the interest he paid it as debtor, and was no more entitled to commissions than he would have been upon paying his interest to a stranger on money borrowed.

The trustee having retained the interest after it was due, is bound to pay interest upon it from the day it became due, on the 20th of July in each year, and the account must be stated accordingly.

Another question is as to the removal of the trustee. Courts of equity have power to remove trustees for neglect or breach of duty, but it is a power to be exercised in each case by the discretion of the court. The trustee, David A. Smalley,

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has personally paid no attention to this trust, but left it to his co-trustee, Abraham Smalley. This often is and must be done for the proper administration of the trust. One of two trustees can often better discharge the trust than two, and if the acting trustee in such case has properly discharged the trust, the other will not be removed for this. But if one trustee abandons it to another, who violates the trust, squanders the funds, or uses them in his own business without security, and such conduct is known to him, he is as guilty of a breach of trust as the acting trustee, and, like him, can be removed for such conduct. Here it is shown that David had knowledge of the conduct of his co-trustee in this trust and did not interfere, therefore the whole question is as to the conduct of the acting trustee.

A trustee will not be removed for every violation of duty. For acts done in bad faith, or that have diminished or endangered the trust fund without bad faith, it is the duty of the court to remove him. Here it appears that the trustee is a responsible man, of large property, and engaged in no hazardous business, and that the fund has not been in any danger, and it is easy to conceive that he supposed the money was as safe in his hands as in any investment he could make, and that retaining it would save expenses to the fund. I cannot consider that his good faith is impeached.

In some matters his conduct seems to have been vexatious and troublesome, but not so much so that it could not be explained by the circumstances, if they were all before me; and, on the whole, this is not sufficient for removing him from the trust.

The trustees will not now be removed; but if the neglect of performing their duties is continued, the denial of this relief is without prejudice to a future application. It is the duty of the trustee to invest this money on bond and mortgage, or in securities of this state or of the United States; and it must be invested, if on mortgage, at the highest rate of interest allowed by law, if such investment can be procured, and so a

 Corlies v. Corlies' Executors.

to be subject to taxes, if the trustee resides in the part of state where such exemption exists.

There is no controversy as to the amount of the principal of the trust fund, and there is no necessity for an accounting taken of it. The complainant is entitled to a decree for the two yearly installments of interest on the fund of \$100 at seven per cent., that have become due since July 1, 1869, with interest on each from the day when it became due. If the parties agree upon the amount, there is no necessity of the expense or delay of a reference to a master. The decree must be with the costs of the complainants, to be paid by the defendants out of their own estates.

 CORLIES vs. CORLIES' EXECUTORS.

A plea that the complainant "is incapable of taking care of herself or property," not specifying the particular incapacity, is bad and insufficient.

A plea that goes to the whole bill, and is coupled with an answer in support of it, but which denies the equities set up in the bill, is ruled by the answer.

A motion to strike out an insufficient plea is not correct practice. The plea should be set down for argument.

On motion to strike out plea.

Mr. Gummere, for motion.

Mr. P. D. Vroom, contra.

THE CHANCELLOR.

The defendants filed a plea and answer. The plea is that the complainant "is incapable of taking care of herself or her property." It does not set up idiocy, lunacy, or imbecility, and, or an inquisition found. The incapacity may be

Mellon v. Mulvey.

from bodily infirmity. The plea, of itself, is bad and insufficient. Besides, it is a plea that goes to the whole bill, and is coupled with an answer not in support of it, but which denies the equities set up in the bill. This overrules the plea. On either of these grounds the plea must be overruled. The motion to strike out the plea is not correct practice, in case of an insufficient plea. But I will consider the motion as if the plea was set down for argument, and order that it be overruled.

MELLON vs. MULVEY and wife.

1. A voluntary conveyance made by a solvent debtor is good against subsequent debts, if made in good faith and without intention of contracting debts designed not to be paid.

2. But a conveyance given by a husband to his wife, with the manifest intention of protecting his property against debts which he intended to contract, and which is fraudulently used for that purpose, is void as to a judgment creditor.

3. A conveyance by a debtor to his wife after he contracted part of the debt for which complainant has a judgment, the residue being contracted afterwards without any notice to the complainant of the conveyance except the record of the deed, and the wife having knowledge of contracting the debt, is void as against the complainant.

Argued upon bill, answer, and proofs.

Mr. Aitkin, for complainant.

Mr. Hageman, for defendants.

THE CHANCELLOR.

The suit was by a judgment creditor of Mulvey to have a conveyance made by him to his wife declared void as against the complainant, as being without consideration and fraudulent.

The defendant, Mulvey, conveyed the property in question

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His wife after he contracted part of the debt for which the complainant has judgment. The residue was contracted afterwards, without any notice to the complainant of the conveyance, except the constructive notice by recording the deed. The wife knew of contracting the debt, which was for a cask of liquor for a rum shop kept on the premises, and gave the complainant no warning. It was conceded on discussion at the giving of the deed, that the conveyance would not be valid against the part of the debt then due, which, in fact, the wife now tenders herself ready to pay. I am not satisfied that any consideration, except moneys that at law belonged to the husband, was paid for the conveyance. If any such was paid, it was a very small part of it.

A voluntary conveyance made by a solvent debtor is good against subsequent debts, if made in good faith and without intention of contracting debts designed not to be paid. The circumstances of this case show clearly that this conveyance was intended to protect the property of the husband against debts which he intended to contract, and the conduct of the wife shows that it was fraudulently used for that purpose. It must be declared void as against the complainant.

MEIGS and others vs. LISTER and others.

1. It is not necessary for the purpose of an injunction that the odors or noisances arising in the carrying on of the defendants' business should be noxious or unwholesome; it is sufficient if they be so offensive or disagreeable as to render life uncomfortable.
2. A mistake in the name of the location of the defendants' works whence the nuisance arises, cannot affect the question.
3. That a nuisance is not constant does not affect the right of a party injured thereby to protection.
4. A party's right to relief from the nuisance of the defendants' works is not affected by the allegation (were it true,) that the locality is surrounded by other nuisances, and dedicated to such purposes.
5. If there are several nuisances of the like nature surrounding the

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complainants, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*.

6. That the city of New York should have some place where it can deposit and utilize its filth, and that it has selected the place in this state where the defendants' works are carried on, will not compel the complainants to submit to the injury as a *damnum absque injuria*. What place such filth could be taken to where it would be less injurious than the place so selected, is not a question for the consideration of this court.

7. Where the fact of the nuisance is free from doubt, a delay of several months will not prevent relief by preliminary injunction.

The argument was had on rule to show cause why an injunction should not issue, upon the bill of the complainants and the answer of the defendants, and the affidavits annexed to them.

Mr. Winfield, for complainants.



Mr. F. Stevens and Mr. T. N. McCarter, for defendants.

THE CHANCELLOR.

The complainants are residents of the city of Bayonne. Henry Meigs, J. R. Schuyler, Solon Humphreys, and John J. Serrell, reside on the east side of and adjoining Newark bay; Rufus Story, on the north side of and adjoining Kill Von Kull. All have resided there for some years. The four first named reside within about a mile and a half of an establishment on the west side of Newark bay, upon Maple Island creek, erected and carried on by the defendants for drying bones, rendering matter, and other refuse animal matter received and imported from the city of New York and other places. They complain that a noisome, unpleasant, and sickening odor escapes from this establishment, which, when the wind blows from that direction, surrounds and enters their dwellings, pollutes the air around and in them, renders it impossible to be upon their piazzas or grounds with comfort, or in their houses when the doors or windows are open, and which nauseates and actually sickens them and their families.

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1 Rufus Story all complain that the boats of the defendants in passing through Kill Von Kull and Newark Bay refuse and rendering matter, pollute the air and render it uncomfortable. The complainants pray an injunction against carrying on this business of drying bones, rendering, and other refuse animal matter at this establishment against transporting it through Newark Bay or Kill Von Kull, except in air-tight compartments or vessels, so that the foul odors could not escape.

The complainants are well-known citizens of the highest intelligence, and in their affidavits annexed to the bill state positively that they reside in the locality stated, and actively own their residences. That they and their families are, and have been for two years past, annoyed by offensive, and sickening odors and stenches, such as coming from the establishment, and oblige them to leave their grounds and piazzas, and to close the windows of their houses, and such as at times actually to nauseate and prevent them from taking their meals. That the air there was pure and uncorrupted before the defendants erected their establishment, and that these odors proceed from the establishment of the defendants' business carried on there. The odors have been carried by the wind in boats across the bay to the establishment of the complainants, who found, upon going around the works, that there was no foul odor of the kind on any side, except towards the establishment which the wind was blowing.

The facts, if not answered and contradicted in such manner as to raise a doubt about them, are sufficient to entitle the complainants to the interference of the court for their protection.

It is not necessary for that purpose that odors or gases be noxious or unwholesome; if they are offensive and annoying in such manner as to render life uncomfortable, an injunction is sufficient. This doctrine was examined into and acted upon in the cases of *Ross v. Butler*, 4 C. E. Green 294; and *People v. Citizens Gas Light Co.*, 5 C. E. Green 201.

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The only question here is, whether the allegations and proofs of the complainants are denied or disproved, or serious doubt thrown over their truth, by the answer and the affidavits annexed to it.

The answer denies that the works of the defendants are on Bound creek, as stated in the bill, but states the location to be on Maple Island creek, one-third of a mile further north. A mistake in the name of a creek cannot affect the question.

The answer admits that the defendants erected their works in 1869, at the place in question, and maintained them until August 31st, 1870, when they were burned down. That the works consisted of a one-story building two hundred feet long and eighty feet wide, with a platform fifteen feet wide along the front on Maple Island creek. That the building contained a drying apparatus constructed of brick, six feet high, fifteen feet wide across the whole width of the building, in which were flues for fires to heat the apparatus for drying the materials placed upon it. That they brought in barges from New York the refuse animal matter discharged from a floating rendering establishment maintained in the Hudson river by the municipal authorities of that city, or with their approbation, in which the refuse animal matter from the markets and streets in that city was gathered and boiled, and the fat and some other materials extracted and utilized. That the refuse was discharged fresh from the rendering tanks into the barges of the defendants, of which one daily was brought, and continues to be brought to the establishment of the defendants. That on receiving and in transporting and using this material, disinfectants were used. That this material was landed upon the platform, stored in the building to the depth of six or eight feet, dried on the platform and on the drying apparatus, on which it was stirred and turned over by the workmen, the moisture and odors being expelled by the fire below. That an indictment was found in the Hudson County Oyer and Terminer against them for nuisance in maintaining this establishment. That two days after it was burned, a remonstrance or petition, signed by hundreds of the inhabitants

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of Bayonne, was presented to them against rebuilding this establishment. That they rebuilt it, but put only a few flues in the brick drying apparatus, and these few were used but for a short time. That they have erected there a platform two hundred and fifty feet square, on which this material now is spread, to be dried by the wind and sun, being stirred and turned over by the workmen. These materials are here dried to be taken to their bone dust and fertilizer factory on the Passaic, near Newark, where they are ground and manufactured into fertilizers.

They admit that some odors arise from the process of drying, and that these, at least those from the process as at first carried on, may be offensive to some persons not accustomed to them. They deny generally that they are unhealthy or noxious, or so offensive as to make life uncomfortable, and they do not believe that they caused the nausea and sickness and discomfort alleged by the complainants.

The defendants, by their answer, do not, if the affidavits be taken literally, deny under oath a single material fact charged in the bill. The affidavit is only as to the acts of the defendants, and does not apply to the facts that offensive and noxious odors arise from their works, and are carried over to the city of Bayonne, and make the homes of the complainants uncomfortable. But if the affidavits are construed to apply to and verify every fact stated in the answer, the statements that odors arise from this business, offensive to some persons, and that the odor is of the same kind, though more intense than that from their bone factory on the Passaic, are, to a great extent, admissions of the facts on which the complainants' charges are founded. They admit almost everything except the intense offensiveness of these odors when they reach the complainants' residences; and of that the defendants have not, and do not pretend to have personal knowledge. The business of the defendants, conducting a bone factory and preparing the refuse of the streets, slaughter-houses, and markets of a great city for manufacture, is of a like kind with many other trades and business, perfectly

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lawful, that are universally recognized as nuisances; and where carried on, it requires clear and positive evidence to show that they do not affect those residing in their vicinity. Drying such materials as these are admitted to be, whether by fire, the wind, or the heat of the sun, from the nature of things, cannot fail to create offensive and disgusting odors and stench. Whether these could, at the distance of one or two miles, in any state of the wind, affect persons so as to render them uncomfortable and to nauseate and sicken them, is a fact that is not self-evident, or perhaps probable, and requires evidence to sustain it. Of this there is abundant evidence on part of the complainants, and no denial by the defendants of their own knowledge. It does not appear that they were ever on the eastern shore of Newark bay. The immense mass of this refuse animal matter carried from the rendering tanks in New York, stored in the building and piled on the platform at Newark bay, and spread out on a surface exceeding sixty thousand square feet to dry, sufficiently accounts for an amount of offensive odors and gases to be effective at the distance of two miles. So far, then, as the answer is concerned, giving the most liberal construction and effect to the affidavits, the equity of the bill is not denied. There is no denial by any one on his own knowledge, of the fact that the complainants are affected, annoyed, and made uncomfortable by disgusting, nauseating, and offensive odors, or that these odors proceed from the establishment of the defendants.

Annexed to the answer is a large number of affidavits made by strangers, for the purpose of showing that the affiants have been or lived upon the east shore of Newark bay, and have navigated the bay, and have not noticed or been seriously affected or annoyed by odors or vapors from the works of the defendants; and to show that there are divers other establishments at distances varying from three to six miles from the residences of the complainants, from which bad odors or smells may or do come.

These affidavits may show that these particular affiants may have been there when these odors were least offensive, or

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that having no interest in the matter they gave but little heed to them, or that they are persons to whom foul odors of this kind give little offence. But they do not contradict or throw any doubt upon the fact that at the times mentioned in the bill, and the affidavits annexed, the complainants and their families were annoyed, nauseated, and made uncomfortable by these odors proceeding from the defendants' works. That the nuisance is not constant, but only when the wind is in one direction, does not affect the right of the complainants to protection. They are not obliged to submit to be made uncomfortable and miserable one day in twenty, in consideration of being allowed to enjoy the other nineteen.

The position taken by counsel that the complainants were entitled to no relief from this nuisance because the locality was surrounded by other nuisances and dedicated to such purposes, has no foundation in law or in fact. If there were several nuisances of the like nature surrounding them, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*. The poudrette factory on the Passaic and the abattoir at Communipaw, are six miles from the houses of the complainants, and if there is any affidavit that they do or can annoy the complainants, no credence can be expected for it. The other establishments are all more than three miles away, and are not of a nature to annoy the complainants at that distance.

The theory urged with much force by counsel, that it is necessary that the city of New York should have some place where it can deposit and utilize its filth, and that having selected this place, the complainants, though injured, must submit to the necessary consequence as *damnum absque injuria*, I do not think sound. I do not think it necessary that this court or this state should answer the question boldly propounded by counsel, to what place can it be taken where it will be less injurious than here. That city, without the consent of New Jersey, has no right to make any part of this state its sewer or its pest-house, even if it would do less injury than to places at like distance on the shores of Long Island or

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Staten Island. There may be, or may not be, such pollution. In this case it does not appear. But the residents and owners of the villas and sites for villas in this most beautiful and desirable part of New Jersey, could, and beyond doubt would, afford to raise a fund, the interest of which would suffice to transport a barge laden with this offensive refuse daily out of Sandy Hook to be dumped into the ocean, rather than have them desolated and made valueless by an establishment of the kind that this is alleged to be, if the only reason for maintaining it was that Jerseymen hold their houses on a base tenure of being obliged to provide a cess-pool, or so for the impurities of the city of New York.

As before observed, I have no doubt as to the fact of injury, of its aggravated character, or that it is caused by the works of the defendants. If there was any serious doubt as to the delay of the complainants has been such that a preliminary injunction should not be granted until after a trial at law. Of the indictment they have no direct control. It should have been tried if it was under their control. But they could have each brought a civil suit, and possibly had it determined by the verdict of a jury before this. The nuisance now complained of has existed since the winter of 1871, where the fact of the nuisance is as free from doubt as in any case, this delay should not prevent the relief by preliminary injunction.

As to the other branch of the application, the transportation of their material along the Kills in boats without air-tight covers, if the fact of such transportation is admitted; nor is it denied either in the answer or affidavits, by any one having personal knowledge of the fact, that in transportation it emits an offensive, disgusting odor. It is practicable to cover the boats so nearly air-tight that no offensive odor can escape from the material transported. Whether a wooden barge, on which the material has been transported, can be so cleansed that it will not be offensive when returning, unless covered in like manner, is a doubtful question.

An injunction must issue to restrain the defendants

 Moies v. O'Neill.

taking to their works or establishment at Maple Island creek, or any place in its vicinity, the refuse or rendering matter from rendering tanks in the city of New York or elsewhere, or any refuse animal or rendering matter; and from drying or baking any such matter there by heat, or the sun or wind; and from carrying on any manufacture or business there that shall produce offensive odors that may be carried or wafted to the residences of the complainants, or any of them; and from transporting through the Kill Von Kull or Newark bay any such matter, except in boats or barges with air-tight covers, such as to prevent any offensive odor from escaping from them, perceptible on the shores.

MOIES vs. O'NEILL.

1. The equities of the bill being denied, injunction dissolved, and motion for receiver refused.
 2. That the partnership business is unprofitable and the partnership should be dissolved or discontinued, is not a sufficient ground for enjoining one of the partners from going on with the business and settling up the affairs, or for taking the property out of his hands to be administered by a receiver.
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Argued on motion by complainant for a receiver, and on motion by defendant to dissolve the injunction heretofore granted.

Mr. Ransom, for complainant.

Mr. McGill, for defendant.

THE CHANCELLOR.

The defendant has fully answered every allegation in the bill on which an equity could be raised either for an injunction or receiver. The partnership business may be unprofit-

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able, and it may be that the partnership should be dissolved or discontinued. But there is no reason for enjoining O'Neill from proceeding with the business and settling up the affairs, or to take the property out of his hands to be administered by the expensive and destructive machinery of a receiver in chancery.

The injunction must be entirely dissolved, and the motion for receiver is refused.

CORNISH vs. CORNISH.

1. Where the conduct of the husband is the cause of the wife's leaving her home, and his actions since have been such as to prolong her absence for three years, such absence is not desertion contemplated by the statute, and no divorce can be had.

2. Where the husband has not made the advances or concessions which a just man ought to make to put an end to his wife's desertion, induced, though not justified by, his conduct to her, the desertion, though willful and continued, is not obstinate.

This cause was heard *ex parte* upon report of the master, and the proofs before him taken *ex parte*.

Mr. M. Beasley, Jr., for petitioner.

THE CHANCELLOR.

The circumstances under which the defendant left the petitioner and has continued away, do not, in my opinion, make her absence the willful, continued, and obstinate desertion intended by the statute. He did much to provoke her going away, though his conduct did not altogether justify it. He has done nothing since to induce her to overlook or forgive his conduct, which provoked her to leave, or made any attempt to induce her to return, but has acted as a husband would act who wished his wife to stay away for the three years.

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quired by the statute to convert desertion into cause for divorce.

On the occasion of her leaving, he returned home at an unreasonable hour of the night, and woke her up from sleep to admit him; it was, perhaps, her duty as a wife to have done so instantly and to have admitted him with that appearance of cheerfulness which many feign and few feel. But his conduct in resenting her tardiness and discontent by threatening to chastise their infant of a year old, because, when he was waked up, it made some noise, as every child would do, was brutal. She very properly snatched up her child to protect it, and also fell into a passion, it may have been too violent, but some passion was unavoidable. Instead of endeavoring to soothe and quiet her, he left the room. She has been living with him in the house with his father, mother, and other, away from her own relatives, and although his mother endeavored to pacify her, yet when she naturally spoke of returning to her father's house as a refuge from this treatment, her husband, instead of calming her, harshly bid her to look to the consequences of the step she was taking.

He sent her away in this mood at midnight, with a hired man, to her father's house, three miles distant. He has never returned to her since to seek for reconciliation or ask her to return. He has met her a number of times without speaking to her. Her temper may be too quick and too violent, but it was his duty to go to her after leaving under these circumstances, and see if some contrition, some concession on his part, could not do away with the effect of his harsh conduct on that night. Her threat, in the anger of the moment, never to live with him and to obtain a divorce, are not sufficient excuse for not making the attempt. He has acted as if anxious to convert a small quarrel between him and his wife, in which he was both much and most to blame, into a legal ground for divorce. He has not made the advances or concessions which a just man ought to have made, to put an end to this desertion. For want of this, a desertion which was willful and continued, cannot be adjudged obstinate.

The divorce must be refused.

Goodwin v. Goodwin.

GOODWIN vs. GOODWIN.

1. An allegation that since September, 1869, (the bill being filed in November, 1871,) the defendant committed adultery with P. M. G. at a house in Amity street, in the city of New York, sufficiently individuates offence. The time need not be more specifically alleged.

2. The offence being sufficiently specified, the demurrer being general is overruled.

The cause came up for argument on demurrer to the bill of complaint.

Mr. W. S. Whitehead, for demurrer.

Mr. Collins, contra.

THE CHANCELLOR.

The bill in this case is for divorce on account of adultery. The demurrer is general, to the whole bill, and the ground of demurrer is that no offence is sufficiently specified so that defendant can individuate it, or know what occasion is intended so as to prepare her answer or defence.

One of the specifications is, that since the removal of parties to West Bergen, in September, 1869, the defendant committed adultery with P. M. G., at a house in Amity street, in the city of New York. This is sufficient in all respects, except as to the time; that extends from September, 1869, to November, 1871, the time of filing the bill. The question is, whether a more definite designation of the time is necessary.

In equity there is no rule laid down or adopted as to the manner of alleging the time of the material facts set forth. In the most approved precedents of forms of bills, the allegation is usually sometime in or about the month of —. The only authority is an expression of Chancellor Green in *Marsh v. Marsh*, 1 C. E. Green 395, that "it is not necessary

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ial cases, to state the day, but the month and year stated." This was no doubt founded upon the practice familiar to the Chancellor above referred to. There is no authority, and evidently did not intend to make as a strict rule of pleading in chancery, but states the proper mode in bills of equity. At law, both in criminal proceedings, it is always necessary to state the day, and year. But it is never necessary to prove in certain cases, where the time is necessary to connect the offence or fix the liability. Generally, the act is proved at any time within the statute of limitations, where there are not technical rules as to the form of pleading as there are at law, I see no reason to make a rule of pleading shall be as to a time certain, either as to the day, or year, when it is not required to prove the fact alleged. Such allegation would be mere form; and which would do no good and might mislead. I find no authority requiring such allegation of time, such as would be to sustain a demurrer.

The question is, whether the defence is sufficiently stated. The name of the person is stated, also the locality, of the house in which the offence was committed, this seems to me sufficient; it complies with the requirements as the object of it is concerned. If it had been alleged to have taken place on a specified day in August, the offence at any time within the two years might have been proved. If defendant had committed adultery a number of times within these two years with P. M. G., in Amityville, New York, it would not individuate the offence, but it would if a day or month had been stated. If the offence is sufficiently specified, the demurrer, if sustained, must be overruled.

Murray v. Elston.

MURRAY vs. ELSTON.

1. A party to a suit can be compelled by a subpoena *duces tecum*, to produce papers and documents to be used on the trial as evidence.

2. A subpoena *duces tecum* commanding a party only to appear at a certain place and time named in the writ, and bring with him a certain book, but omitting the direction to testify, is invalid, and the party refusing to obey it cannot be attached for contempt.

On rule to show cause why an attachment should not issue for contempt, on affidavits.

Mr. W. B. Williams, for the rule.

Mr. A. Zabriskie, contra.

THE VICE-CHANCELLOR.

While the evidence in this cause was being taken before the master, the complainant was sworn and examined as a witness. He referred, in his testimony, to an entry in a book in his possession, which book he declined to produce. The defendant afterwards served him with a writ, intended to be a subpoena *duces tecum*, commanding him to appear before the master with the book at a time and place named. The complainant refused to obey, and upon a rule to show cause why an attachment for contempt should not issue against him, two questions were raised as the questions on which the decision of the motion for an attachment must turn.

1. Whether a party to a suit can be compelled, by a subpoena *duces tecum*, to produce papers and documents to be used on the trial as evidence; and,

2. Whether, if so compellable, the writ served in this case was valid and sufficient.

The argument that a party to the suit is not liable, in this respect, like any other witness, was drawn from the act concerning evidence, approved April 5th, 1855. *Nix. Dig.* 1043

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ixth section of that act provides that "the court, other he court for the trial of small causes, before which a action or proceeding is pending, may, in their discretion pon notice, order either party to give to the other, within ified time and upon such terms as may be imposed, an tion and copy, or permission to take a copy, of any , papers, or documents in his possession or under his l, containing evidence relating to the merits, and if com- e with the order be refused, such books, papers, or doc- s shall not be given in evidence in such action, and the refusing be liable for contempt."

s section not having been repealed by the act of 1859, ich parties themselves were made competent as witnesses, ter act, it was contended, should be construed in con- n with the former, and not be held to furnish an addi- means of access to a party's private papers and books. ediedy provided by the first act, it was said, is ample, as parties are concerned, for the discovery of evidence, e statute, in granting against parties a remedial proceed- t available against witnesses in general, was not de- further to subject their private papers and books to an onal liability of invasion. On general considerations edieney and policy, it is difficult to perceive why docu- and books, whose production would elucidate the issues ed in the suit, should be more guarded or inaccessible hands of the parties than in the custody of others; but er this may be, the explicit language of the act puts the : beyond question or doubt. "No person," the lan- is, "shall be disqualified as a witness in any suit or ding at law or in equity by reason of his or her interest event of the same, as a party or otherwise." Whoever : the statute could be a witness, could be compelled, by poena *duces tecum*, to attend at the trial with the required ument and produce it in evidence, unless some lawful or able excuse could be given for withholding it; of the ity of which excuse the court, and not the witness, was lge. The language of the act removes all disabilities

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and makes all witnesses alike. The inspection provided for is neither incompatible with nor an adequate substitute for the production, at the trial, of the documentary proofs. The former is permitted at the discretion of the judge, upon application and upon terms, and while an important and efficient mode of eliciting the truth in preparation for the trial, does not supersede but is supplemented and enforced by the later statute, compelling the bringing of the instruments into court. This construction has been repeatedly put by the courts of New York upon the similar provisions of their code. In *Trotter v. Latson*, 7 How. Pr. R. 261, a party refusing obedience to a subpoena *duces tecum*, was justified by Judge Roosevelt, because the words of the code, "may be compelled to testify," included only the giving of testimony orally, and not the production of papers or books. The right to inspect and have copies of the latter, provided for in a previous section of the code, as it is in our statute, was thought by that judge to prevent one party from compelling the other to offer them in evidence at the trial. But this ruling was afterwards repudiated in *Bonesteel v. Lynde*, 8 How. Pr. R. 226; also in *People v. Dyckman*, 24 How. Pr. R. 222; and in *Mitchell's case*, 12 Abbott's Pr. R. 249. In all these later cases it was held not to be an open question that a party examined as a witness could be required, by subpoena *duces tecum*, to produce documents and books pertinent to the issues, to be used as evidence at the trial. In the present case, therefore, the complainant was wrong in refusing, on this ground, to obey the subpoena.

Was the writ that was served on him a valid and sufficient one? The objection to it is that it did not contain the customary words directing him to testify. It commanded him only to be and appear at the office of the master, and bring with him the book. Of the reason why he was to appear, or what he was to do when he got there, nothing was said. The defendant, doubtless, wanted only the complainant's book, and not his testimony, and hence the omission. But the omission is fatal to the authority of the writ. The power of a court to

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el the attendance of a witness, is derived from the purpose for which he is to come, *viz.*: to give evidence in some suit, or proceeding pending before it. An arbitrary and expensive command to go here or go there, would obviously be nugatory and vain. This is the difficulty with the present *cæna*. Had the complainant appeared with the book, no objection could have been made of it without his consent, for a person actually present at the trial may refuse to be sworn as a witness, unless he have been duly subpoenaed. Departures from the established common law forms are apt to be found also in the statutes from the substance to which the forms were originally and nicely adjusted. The complainant, on the latter ground, cannot be deemed guilty of contempt, and the rule must be discharged, but his refusal being wrong on the first ground, which was the main one, the rule should, I think, be discharged, without costs.

I respectfully advise as above.

CASES

ADJUDGED IN

THE COURT OF CHANCERY
OF THE STATE OF NEW JERSEY.

OCTOBER TERM, 1872.

JOHNSTON and others *vs.* JONES and others.

1. A court of equity has no jurisdiction to remove an officer from an office of which he is in possession, or to declare such office forfeited. But when, in a suit of which equity has jurisdiction, the question of the right to an office, or as to the regularity of an election, arises, and must be decided to obtain the equitable relief, that court is competent to inquire into and decide these matters for the purpose of the suit. But its decision will not, like that of a court of law, upon a *quo warranto* or *mandamus*, operate *in rem*, and remove or oust any one from an office which in fact he holds.

2. To enforce trusts, suppress frauds, and compel the performance of contracts, are peculiarly within the province of a court of equity. These ends may be attained by injunction, decree for specific performance, or both. If the subject matter be within the jurisdiction of the court, all its powers and process will be used to effect the object to be attained.

3. That the defendant obtained an office claimed by him in a corporation by an election procured to be held by him by fraud, by breach of trust and a positive agreement, by concealment and treachery, confers on a court of equity jurisdiction to inquire into the validity of such election, for the purpose of restraining the acts of the defendant and other persons claiming office by such election. This could be done, even if the election held in such breach of trust had been conducted in the manner required by law, and would not be set aside by the courts of law.

4. When the object of a bill, filed in the name of a corporation, is to restrain acts of the defendants which they could only legally do as directors, they must show either a legal election that would put them in possession

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the offices, or that they are *de facto* directors of the corporation; and the facts must be determined by the court in order to decide whether the power is sufficient to dissolve the injunction.

1. When a charter directs that all elections of directors after the first shall be held annually, at such time as the by-laws shall direct, no second election can be held until by-laws designating the time have been adopted. It can there be an omission to hold an election, such as to authorize the directors to designate a day for it provided for only in case of such session.

2. Acts required to be done by the directors of a company, as the designating a time for election, must be done by them as a board when lawfully convened.

3. A determination by the board or a majority of directors that an election must be held, without fixing a time, does not authorize one of them to the time and give notice for such time.

4. A notice of an election required to be given by the directors, is not a sufficient notice, if signed by the individual names of a majority, without stating that it was given by order of the board, or stating that the persons whose names were signed were directors.

5. An election is not legal, if the list of stockholders exhibited and acted upon on the day of election is not a true list of the stockholders, and known to be such by the parties who exhibit it, and who vote upon it.

6. Stockholders who are not such at the day an election is held, cannot sue, although they were stockholders at the day on which it should have been held.

7. A majority of a board of directors, who have been legally elected, and are in fact in possession of their offices, and in whose place no directors have been legally elected, have the right to use the name of the corporation in a suit.

The argument was on motion to dissolve the injunction in this suit, made on bill and answer.

Mr. I. W. Scudder and *Mr. J. B. Vredenburg*, for motion.

Mr. Vanatta and *Mr. Frelinghuysen*, contra.

THE CHANCELLOR.

The injunction was granted on application of the complainants, Johnston and the Perth Amboy and Elizabethport Railroad Company, to restrain the defendants, Jones, Carpenter, Arnold, Bell, and Lindsley, who claimed to have been elected directors of the company, from interfering with the contract-

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ors in constructing the road of the company, and from selling or pledging any stock of the company, and from exercising the rights and powers of directors.

The charter of the company, by the act approved March 30th, 1869, fixed the capital at \$200,000, in shares of \$100, with the privilege of increasing it to \$300,000, with power to go into operation when \$20,000 was subscribed for, and ten per cent. paid in upon it. In August, 1869, \$20,000 of the capital was subscribed for by B. Williamson, A. Green, C. Parker, A. W. Jones, D. P. Carpenter, and eight other persons, who subscribed for five shares each. The ten per cent. on the whole was paid by the check of B. Williamson, for \$2000, payable to the order of A. Green, treasurer; this was accepted by the commissioners as cash, and was handed by them to the treasurer when elected, and received by him as cash. No part of this money was contributed by any subscriber but Williamson. On the 7th of September, 1869, the five subscribers above named were elected directors. The directors elected Jones, president; Green, treasurer; and William Paterson, secretary.

A route or routes for the road was surveyed, but the road was not located, or anything done towards its construction or commencement.

In the spring of 1871 negotiations were had with the complainant, Johnston, to furnish means to construct the road, and a written agreement was entered into by four of the five directors with Johnston, by sending to him the following proposition, which he accepted :

“NEW YORK, June 5th, 1871 -

“JOHN T. JOHNSTON, *Esq.*

“*Dear Sir* :—The subscribers, directors of the Elizabethport and Perth Amboy Railroad Company, in consideration of the payment by you of \$6000 to defray the expenses of organization and other incidental matters, and of your engagement with us to supply the means for the construction of the road without further delay, do hereby place in your hands the

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rol of its charter, and agree to hold and manage the same in accordance with your wishes, or to vacate our places in favor of such persons as you may designate. Our only contention is, the immediate prosecution of the work.

The \$6000 above mentioned has been used as follows :

To pay Col. A. W. Jones,	\$2000
To pay A. Green,	2000
To pay William Bell, former contractor, assignee of E. Handford & Co.,	2000

\$6000

We know of no other possible claims against the company.

“Very respectfully yours,

“C. PARKER,

“A. GREEN,

“B. WILLIAMSON,

“A. W. JONES.”

Johnston accepted this proposition, and paid the \$6000.

By transfers signed on the transfer book of the company, and dated September 1st, 1871, Green transferred to Johnston his stock, and each of the other four directors, including Carpenter, who had not signed the proposition, transferred to Johnston all his stock except five shares, and gave to him a power of attorney to transfer these five shares to himself.

Certificates for the shares so transferred, dated on the same day, were signed by Jones, as president, and Carpenter, as secretary, on the certificate book of the company, and issued to Johnston.

The bill alleges that Jones promised Johnston to procure from the eight subscribers for five shares each, powers to transfer these shares to Johnston, and that he procured them upon sign blank powers on the representation that they were for Johnston. These facts, supported by the affidavits of six of these subscribers annexed to the bill, are denied in the answer. At a meeting of the directors, held in New York on September 11th, 1871, Jones, Williamson, Carpenter, and Parker

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were present. The resignation of Green, as director and treasurer, was presented and accepted, and Johnston was elected to both offices in his place. Paterson resigned as secretary, and I. W. Watson was elected in his place, and James Moore was elected as engineer. From that time, these persons entered upon and performed the duties of their respective offices, and were recognized as such by the other officers of the company, including Jones and Carpenter. For, although Jones in his answer denies such recognition in general terms, he admits that he applied to Johnston, the treasurer, for salary; and to Watson, the secretary, for the book of minutes.

Johnston paid into the treasury, at different times, \$118,000, of which about \$112,000 has been expended in prosecution of the work. The route of the road was located, and the location filed in the office of the secretary of state; and in January, 1872, a contract was made with P. Brady for grading the road, and he immediately began his work, and was engaged in it until interrupted by the defendants. Jones, by an understanding with Johnston, was continued as president, with a yearly salary of \$2000.

The charter provided that five stockholders should be elected directors, who should continue such for one year, and until others were elected in their stead. That they should manage all the affairs of the company, and should have power to fill all vacancies that should occur in their number. That elections of directors should be held—the first, at a time and place designated and advertised by the commissioners, and upon like notice, annually thereafter, at such time as the by-laws of the company should direct; and if no election should be held upon the day provided by the by-laws, then on any day afterwards designated for that purpose by the directors, upon like notice as aforesaid.

The above facts are alleged in the bill, and substantially admitted in the answer. It avers, indeed, that each of the subscribers did actually pay in money ten per cent. of his subscription—an averment difficult to reconcile with the formal and circumstantial admission that Williamson gave to

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ones his checks for \$2000, payable to the order of A. Green, treasurer, and that Jones paid these to Carpenter as chairman of the commissioners, who paid these very checks over to Green as treasurer, for the ten per cent. There may be some way to reconcile these statements, so as to avoid the charge of perjury, but none that can command belief for the averment that each subscriber paid this ten per cent. in money, especially when contradicted by the oaths of seven of these subscribers.

The denial of the answer, that the transfer book and stock certificate book are the books of the company, because never formally adopted by the company, is overcome by the admission that the president and secretary, two of the defendants, and every director treated and used them as the books of the company; these facts make them the books of the company. The same remark applies to the minute book. And the defendants, who held them out to Johnston as the books of the company, and induced them to act upon that representation, could be forever estopped from denying that they are such books.

In this situation of affairs, Jones, in February, conceived the idea of having an election of directors, without the knowledge of Johnston, and by it transferring the control of the company to other parties; and, to carry out the plan, caused notice to be inserted in some of the newspapers of the counties of Union and Middlesex, of the following purport:

“The stockholders of the Perth Amboy and Elizabethport railroad are hereby notified to meet at Taylor’s Hotel, Jersey City, on Thursday, March 7th, 1872, between the hours of nine and five o’clock, *to wit*, at ten o’clock A. M. of that day, to elect a board of five directors for said railroad company.

“February 14th, 1872.

“A. W. JONES,

“D. P. CARPENTER,

“C. PARKER.”

This notice was not actually signed by Jones, Carpenter, or Parker, but their names were signed by Jones’ direction, by

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his clerk. The answer of Jones and Carpenter states that Parker's name was signed by his authority given to Jones verbally, in general terms; that Jones and Carpenter consulted with Parker, and it was determined by the three to issue a notice for the election, and Jones, as president, was directed so to do; and thereupon Jones designated the time and place for the election.

Jones, although between the date of the notice and the time fixed for the election, called at the office of Johnston, which was also the office of the secretary, and borrowed and returned the book of minutes, and called on Johnston for part of his salary, on pretence that he was going away, yet did not inform Johnston of the intended election; nor was Johnston, who was, *de facto*, treasurer, or Watson, who was, *de facto*, secretary, and who, together, had possession of the transfer and other books of the corporation, requested to make out a list of stockholders for the election. From these admitted facts the inference is irresistible that it was intended to conceal the intended election from Johnston.

On the 7th of March, 1872, the time fixed in the notice, Jones and Carpenter, two of the stockholders, appeared. No other stockholders attended. They chose inspectors of the election, and they produced a list of stockholders, with the number of shares held by each, dated February 23d, 1872, signed by Jones as president, and one B. F. Arnold as clerk. This list was not made out by the secretary or treasurer, or person having charge of the transfer book, nor from the transfer book; nor was it a true list of all the stockholders entitled to vote at such election, and of the shares held by each from the transfer book, which, by the statute to prevent fraudulent elections, (*Nir. Dig.* 170, § 13,) is the only evidence of who are stockholders entitled to vote. The answer admits that Jones, Carpenter, Parker, and Williamson had each transferred all his stock except five shares, and that Green transferred all his stock, to Johnston on the book treated by all the directors as the transfer book, and that Jones and Carpenter had signed the certificates of these transfers, though

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without the seal of the company. Yet Johnston, who then held these one hundred and forty shares out of the two hundred, did not appear on that list as a stockholder; and the parties who had actually transferred these shares, appeared on this list as stockholders. These transfers were known to Jones and Carpenter, who produced and exhibited and voted upon this list, which they knew was not a true, full, and complete list of the stockholders entitled to vote at that election. The votes of some others of these stockholders who had not transferred their shares, were given by Jones, by proxies which he held from them. He voted on ninety shares, including the eighty-five which he had transferred to Johnston, and Carpenter voted on the fifteen which he had transferred. One hundred and forty votes were thus given for the defendants, Jones and Carpenter, B. T. Arnold, W. Bell, and G. R. Lindsley.

These five men thereupon immediately held a meeting, chose Jones, president, and Arnold, secretary, and adopted by-laws, and a transfer book, certificate book, and stock ledger, which had been prepared, and were presented by Jones. At subsequent meetings they appointed a vice-president, a transfer clerk, and treasurer. On the 12th of March, 1872, they opened books of subscription for the capital stock. Jones subscribed for fifteen hundred shares, and presented claims against the company for \$13,200, which were allowed by these directors, notwithstanding the assurance of Jones to Johnston in the written contract of June 5th, 1871, that he knew of no other possible claim against the company than the \$6000 then asked from and paid by him. This sum was accepted as payment of the ten per cent. on one thousand three hundred and twenty of the shares subscribed for by him. Jones thereupon sold, or alleges that he sold, one hundred and eighty-seven of these shares, on which ten per cent. had been thus allowed, to one William J. Howard, for \$7456 in cash.

About the 11th of April, 1872, Jones, with a large force of men, drove Brady, the contractor, from one section of the

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road on which he had been at work under his contract, and forcibly took possession of this section, or one-tenth of the whole work; and then these men, under his direction, proceeded to grade that section on a plan and at an elevation entirely different from that required in the contract with Brady, and forcibly kept Brady and his men from proceeding with the work there; Brady continuing the work on the other sections.

Johnston, about the 15th of April, 1872, by virtue of the powers of attorney given to him by Jones and Carpenter, transferred on the books of the company the five shares of the original stock still standing in the name of each of them.

The bill seeks relief on the ground that Johnston having, on faith of the agreement of June 5th, 1871, paid all the prior expenditures of the road, and advanced more than \$100,000 since for its construction, and having allowed Jones and Carpenter, each, to retain five shares of stock, which, in fact, belonged to him, to enable them to hold their positions as directors for his benefit, they were trustees for him, and that they have been guilty of fraud and treachery in the attempt to take the control of the road from his hands by an election got up without regard to the requirements of law, and concealed from him by artifice and duplicity; and that the whole conduct of Jones and Carpenter in this matter, has been in violation of the written agreement of June 5th, 1871, which was signed by Jones and acquiesced in by Carpenter by his transfer of stock in accordance with it.

Although Jones, in his answer, says that he does not recollect signing this agreement, yet on the argument, upon being shown the original by his counsel in open court, he admitted the signature to be his. By that agreement the control of the charter was placed in Johnston's hands, and the directors agreed to manage it in accordance with his wishes or to resign. It was not an agreement to give the control at some future day; its words are, "we do hereby place."

That Jones or Carpenter never paid any money for, or had any actual interest in, the stock subscribed for in their names,

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is clear. That they held the five shares retained by each in trust for Johnston, who had powers to transfer them, is equally clear.

The facts of the case, as admitted by the answer, either positively or by implication, show clearly that their conduct toward Johnston in this matter has been full of fraud, treachery, and duplicity, and has been in direct violation of the written agreement. And for this no excuse or justification is offered, except a general charge of bad faith in endeavoring to obtain sole control of the company; the very thing they had given him directly by the written contract. In that contract it was stated that the only condition required was the immediate prosecution of the work. That he performed this is not denied.

To enforce trusts, suppress fraud, and compel the performance of contracts, are peculiarly the province of a court of equity. These ends may be attained by means of injunction, or decree for specific performance, or both. If the subject matter is within the jurisdiction of the court, its powers and process will be used so as to effect the object to be attained. Where a railway company, having acquired lands, is engaged in constructing a road upon them, it is an irreparable injury to be driven from them by trespassers, and to have the work suspended until a trial of a suit in ejectment or of trespass. An injunction is, in such case, a proper remedy.

One objection strongly urged by the defendants is, to the jurisdiction of the court, which, it is contended, has no power to inquire into or determine the legality of an election of the directors of a corporation. They contend that this is exclusively within the jurisdiction of the courts of law by the appropriate remedies of *quo warranto* or *mandamus*, or by the proceeding authorized by statute.

It is clear that a court of equity has no jurisdiction to remove an officer of a corporation from an office of which he has possession, or to declare the forfeiture of such office. Its decree will not, like the judgment of a court of law, operate *in rem*, and remove or oust any one from an office which he

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in fact holds. When the object is simply to determine the regularity of an election, or to declare an office to which any one has been duly elected, forfeited, a court of law is the proper and only competent tribunal. So it is the only proper tribunal to recover the possession of lands, or authoritatively to settle and declare the title in real or possessory actions. Yet when the object is to protect lands from waste or destruction, to compel the specific performance of a contract, or to exercise any other power over them vested in a court of equity, it may inquire and determine as to the title. Here, the allegations that Jones and Carpenter obtained the positions they claim by breach of trust, fraud, and breach of agreement, gives this court jurisdiction of the matter for the purpose of restraining the breach of trust, and any acts of such breach that may work irreparable injury, and for the purpose of compelling them specifically to perform their contract. This could be done, even if the election held in such breach of trust had been conducted according to law, and would not be set aside by courts of law.

If the question of the legality of an election, or whether certain person holds such an office, arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into and decide it, as it would any other question of law or fact that arises in the cause. But the decision is only for the purpose of the suit; it does not settle the right to the office or vacate it, if the party is in actual possession. In *Doremus v. The Dutch Reformed Church*, 2 *Green's Ch.* 332, relied on by defendant's counsel, Chancellor Vroom considered and determined which were the trustees of the church; and his decision of the cause depended on that determination. The question was the validity of a mortgage given by the acting trustees. He held that a court of equity could not determine a question of forfeiture directly, and that it ought not collaterally, except in cases of necessity. He held that the consistory, who mortgaged the property, were then the trustees of the church. He was led to this conclusion by showing that they were legally elected, and continued

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to act as such without being removed. In the case of *Den v. Bolton*, 7 *Halst.* 206, where, in an action of ejectment, the question incidentally arose with regard to the same corporation, Chief Justice Ewing, in an elaborate and well-considered opinion on the validity of a corporate election, held that the old consistory had been deposed and the new consistory were the true corporation. And an action of ejectment is not the proper means to determine the right to office, any more than a suit in equity. Yet when the question arises the court must meet it and decide.

In this case, Johnston, Parker, and Williamson, with Jones and Carpenter, were, until March 7th, 1872, *de facto* directors of this company, had control of the charter and corporation, had the books and minutes, had control of the property, and were constructing the road. The defendants contend that on that day an election was held that displaced them, and put the corporation in their control and made them directors. To sustain this defence they must show either a legal election that ought to put them in possession of the offices, or that they are *de facto* the directors and the corporation.

This court, to determine the sufficiency of this answer to dissolve this injunction, must determine these questions. A mere answer that they were the directors, without setting out the facts that made them such, would not be sufficient. When these facts are set out, if they do not, in law, constitute them directors either *de jure* or *de facto*, the equity of the bill is not answered.

The objections to the legality of this election are several :

First. It was not held at a time authorized by the charter. After the first election all others must be held annually, at such time as the by-laws of the company shall direct. The company had no by-laws, and until they directed the time, no election could be had. And the provision that the directors may designate a time, can only be operative where by-laws have fixed a time and no election is held on that day; the words of the act are clear.

Secondly. The day on which it was held was not designated

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by "the directors." The directors are a board, and can only act when legally convened. For this, all must have notice or be present. Two at least of the five were not present and had no notice. And even if a majority of the directors, individually, could designate the time, Parker did not join in designating it. According to the answer, he consented to a meeting, and in general words, by parol, authorized his name to be signed to a call, but Jones designated the day.

Thirdly. The notice did not purport to be given by the directors or their authority. It was a notice by three individuals, without any designation affixed to their names. No stockholder need regard it. Something should have been added to show that it was by proper authority.

Fourthly. No true list of the stockholders entitled to vote, and of the shares held by each, was exhibited at the meeting. The list was false in every respect, and known to be so by the parties that exhibited it. The ninth section of the general act does not permit stockholders, who were such at the day when the election should have been held, to vote, if their stock had been transferred since. It only limits the right to such as were then stockholders. Besides, this election is not within that section, which only applies to elections held within thirty days after the prescribed time.

Fifthly. Three of the persons elected were not stockholders. Jones pretends to have transferred one share of stock to each. But this could only be legally done on the transfer book of the company, which was in the hands of the treasurer, and no such transfer was made.

An election thus conceived in fraud and conducted contrary to law, cannot create directors *de jure*. There is nothing to constitute them officers *de facto*. Their meeting together, electing officers, procuring new books, and voting that they were the books of the company, cannot constitute them such. Johnston, Williamson, and Parker, in fact, remain in their offices, and, as a majority, constitute the board of directors, and have the right to use the name of the corporation in this suit. They have possession of the books, of the funds, and of the

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works of the corporate property, and are clearly the corporation *de facto*.

If a dissatisfied director of one of our large railroad corporations could persuade a town meeting to elect new directors of his company, or was to assemble on such day as he chose to name two of its stockholders, and persuade them to vote on the whole stock of the company instead of twenty shares held by them, for himself and his associates on the ticket named by him, and they were to meet, elect officers, produce and adopt books, and attempt to seize, by force, the road and its equipments, and run the road by their own employees, they would be as much officers *de facto* and *de jure* as these defendants. No one would contend that a court of equity could not restrain, by injunction, such raids as these, but is obliged to leave the corporation and its lawful directors to the remedy at law, always taking at least months, and in the meantime suffer the road to be operated and perhaps ruined by the depredators, because they claim to be directors *de facto* or *de jure*. A court of equity that could hesitate in such case would be of little use.

The motion to dissolve must be refused.

GRAYDON'S EXECUTORS vs. GRAYDON and others.

1. Where a will first *authorizes* executors to sell testator's real estate, expressly, at their discretion, and then *directs* them to convert into money and invest all the rest of testator's estate not already in money, the words "all the rest," *ex vi termini*, exclude the real estate.

2. Shares in the capital stock of corporations are neither money nor securities, but simply the title of the corporator to his proportion of the corporate property and income.

3. Where movables are directed to be sold, and no provision is made for maintaining or keeping the family in the family mansion, executors have no right to leave the furniture in the possession and use of such of testator's children as stay in the mansion.

4. Where a testator directs a specified part of his property to be con-

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verted into money and invested, and the interest paid to his children, this would not include in the direction to invest the proceeds of lands authorized by another clause of his will to be sold at discretion, or other assets not directed to be invested.

5. When a testator has disposed of part of his property by particular bequests and limitations over, and does not dispose of a large part, and makes no residuary disposition, the courts, with no other positive guide to his intention, will not, by speculations or conjectures, intend that he designed to dispose of the whole in the same manner and by inadvertence omitted it; but will rather intend that he designed that the residue should descend as directed by law, free from limitations over, which are not favored in the law of the state.

6. Directions in a will that if one of the sons of testator shall marry a certain person named, he shall take no part of testator's estate, but that the executors should dispose of testator's estate as if that son had died in testator's life intestate, and without issue, takes effect as a residuary bequest upon the marriage of that son to the person named after testator's death.

7. A condition to a bequest to a son of the testator, that it should be void if within a stated time he should marry a daughter of a person named, is not illegal as a restraint upon marriage.

8. Such condition is not void for uncertainty because it appears that there are two persons of the name in the condition—father and son—if it appears by evidence that the son was unmarried, and had no children, and that testator's son, with his knowledge, was paying attentions to one of the two daughters of the father of that name. This is a latent ambiguity arising from extrinsic evidence, and may be explained by such evidence.

This cause was argued upon bill, answer, and proofs.

Mr. C. H. Voorhis, for complainants.

Mr. Knapp, for defendant John Graydon.

THE CHANCELLOR.

The complainants are executors of the will of Samuel Graydon, late of the county of Bergen. The object of this suit is to settle the construction of the will, and to direct the complainants as to their duty in executing it.

The testator died on the 17th day of August, 1869. By his will, dated July 11th, 1868, he authorized his executors, at their discretion, to sell his real estate. He directed them

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convert into money all his personal estate not already in money or securities, and invest the same securely at interest, and to apply so much of the interest as should be necessary, for the support of his children until the youngest should be twenty-one. The great bulk of his estate consisted of shares in corporations, and was therefore included in this direction. When the youngest of his children should arrive at the age of twenty-one years, "then the said principal to be divided between them, share and share alike; said children being Caroline Graydon, John Graydon, Ida Graydon, and Samuel D. Graydon." The sum of \$12,000 of John Graydon's share, and a like sum of Samuel's share, is directed to be kept at interest, and the interest of the part of each paid to him during his life, and at his death the principal to go to his issue. The whole shares of the two daughters were to be in like manner kept at interest; the interest during their lives paid to each respectively, and at her death the principal to go to her issue, when the youngest of said issue shall arrive at the age of twenty-one.

The sixth clause provides as follows: "If my said children shall die before a division of the property be made under the foregoing provisions, leaving no lawful issue, then I give and bequeath all the said rest of my estate, including said money and securities, and real and personal estate of every kind and nature, to my brothers." Besides this, the will makes no disposition of testator's real estate or money, or securities for money, unless the eighth clause is construed to dispose of them in the contingency there provided for.

The eighth clause is in these words: "If my son, John Graydon, shall marry a daughter of A. I. Cameron, of Ridgewood, Bergen county, New Jersey, prior to December 1st, 1879, then my will is, and I order that he take no part or share of my estate, either of principal or interest, and the provision heretofore made for him is upon condition that he do not marry a daughter of said A. I. Cameron before December 1st, 1879. If he do, I hereby declare such provision void and revoked. And in case my son, John Graydon, do marry

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a daughter of A. I. Cameron aforesaid, before December 1st, 1879, then I order my said executors to dispose of my estate as if my son were dead in my lifetime intestate, and without issue, but subject, in other things, to the provisions of this my will."

John Graydon, on the 10th of November, 1869, married Jessie Cameron, the daughter of Alexander I. Cameron, of Ridgewood. They had entered into a mutual engagement of marriage in February, 1868. He then promised to marry her on his return from California, where he was about to go, and from which he returned in September, 1869, shortly after his father's death. He knew the provisions of his father's will before the marriage.

The questions on which the complainants ask for the directions of the court are these :

1. Whether the directions to invest and pay over interest include the proceeds of the real estate and the money and securities for money.

2. Whether shares in corporations are included in the exception of securities, or whether they must be sold without regard to the fact that the interest of the proceeds will be less than the dividends.

3. Whether the executors may permit the furniture and other movable chattels to remain unsold for the use of the family.

4. Whether, if the lands be sold, the income should be paid to the children.

5. Whether the testator is intestate, except as to the personal estate, which is not money or securities for money, and except a legacy of \$1000 which is given to Amanda Field, and an annuity of \$200 given to his mother.

6. Whether John Graydon, by his marriage, is deprived of all right to any part of his father's estate.

1. The will, after authorizing the executors to sell the real estate, and expressly leaving the sale to their discretion, di-

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rects: "All *the rest* of my estate not already in money or securities, I order my executors to convert into money and invest." The words, "all the rest," *ex vi termini*, excludes the real estate which he has just provided for. And he expressly stated as to it: "I do not order them to sell the same; I leave it to their best judgment." This is inconsistent with including it in the property which he now orders to be converted into money.

2. Shares in the capital stock of corporations are neither money nor securities. They are simply the title of a shareholder to his proportion of the corporate property and its income. Bonds, mortgages, notes, bills of exchange, and matters of like nature, are securities for money. Shares of capital stock are never called securities, unless when made so by being pledged as collateral. And here the testator could not have considered them as excepted under the term of securities, for, without these, there was not personal property to produce \$12,000, the sum which he directed to be invested for each of his sons, out of his fourth of the proceeds. Both the language of the will and the condition of his estate show that he intended these shares to be converted into money, and invested. The executors are bound to obey this direction of the will. The wisdom of the direction is not for their consideration.

3. The testator, having no wife, provided for his four children by the interest of \$12,000 for each of his sons, and by the larger interest of her fourth share of the whole fund for each of his daughters. He made no provision for keeping up the mansion as a home for the family. The executors should not allow the furniture and other movables to be used and worn out, contrary to the express direction of the testator.

5. The interest of the proceeds of the lands when sold is not included in the directions of the fifth clause to apply interest to the support of the children.

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5. The only direct and positive dispositions made, besides the money legacy and the annuity, are as to the proceeds of the personal property directed to be converted into money. The money, and securities for money, and the real estate or its proceeds, are not included in this disposition. The language of the fifth clause, which contains the operative words of bequest, is clear and precise. After directing all the rest of his estate, not already in money or securities, to be converted into money, and disposing of the interest until the youngest child shall be twenty-one, it directs that, "then the *said* principal shall be divided between them, share and share alike." And all the other provisions, except those in the fifth and eighth clauses, relate to the shares of the four children in this fund.

The only disposition of any rest or residue of his estate is that contained in that part of the eighth clause, which directs his executors, in case of John's marriage to A. I. Cameron's daughter, to dispose of his estate as if John had died in his lifetime intestate, and without issue, but subject in other things to the provisions of the will.

If John had died in testator's lifetime, the bequests to him would have lapsed; and if there had been a residuary bequest, would have fallen into the residue and been thus disposed of. But as there is no residuary gift, the testator, as to these lapsed bequests, is intestate. Had the principal of the fund been given to his children as joint tenants and John had died, the survivors would have taken the whole. But the bequest to them, "equally to be divided between them, share and share alike," made them tenants in common, and the share of one dying would lapse. Had it been given to the children by the name of children, or as a class, without naming them, then it would have gone to those who constitute that class at testator's death, or the time for division, but here they are enumerated by name in the bequest. And the effect is the same as if it had been given to each by name only. As to the share of John in the fund arising from this conversion of personal estate into money, I am of opinion that the testator

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died intestate, except so far as the words of the eighth se excludes John from any part of it. It must be equally ded among the three other children. The words "subject other things to the provisions of this my will," do not ly to this lapsed share. He was here speaking of his le estate. He had made certain provisions as to the res of each child in the fund directed to be invested, and y in regard to shares in that fund. The general direction dispose of his whole estate as if John were dead in his life- e, might, without this saving clause, have been construed to et the shares of the others. These words cannot be con- ued to extend these provisions further than they are applied the will. Nor can directions or limitations as to John's re, be applied to the issue of the other children. Indeed, e words "in other respects" seem to exclude John's share m this clause. That had just been declared forfeited, and s the only thing to be distinguished and excluded by the rd "other."

The above conclusions are founded on the language used the testator, and are the only conclusions that can be rived at consistent with that language, according to the les adopted for construing language. There is nothing in y provision of any part of the will, or any intention pressed by the testator to lead to a different result, or to se any doubt as to this interpretation. Yet, as a matter speculation, it is not difficult to suppose that the testator ended to dispose of all his property, and has failed to use rds to express that intention. On the other hand, it is sible that he intended to leave the proceeds of his real ate and chattels, and his money and securities, free from strict, long limitation with which he has tied up the special id. He freed the shares of his sons in that fund beyond 2,000, from that limitation. When we look outside of the ll for intention, and use speculation and probabilities to ertain what a testator intended and did not express, we eal the statute of wills and make testaments by the imagi- tion of the judge.

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6. As to the right of John Graydon, it is urged that the person whom John is not to marry is not designated with sufficient certainty; the words are, "a daughter of A. I. Cameron, of Ridgewood." Besides Alexander I. Cameron, whose daughter John married, there was living at Ridgewood one Alpin I. Cameron, who usually wrote his name A. I. Cameron, and was known by that designation. This is a latent ambiguity, or one that does not arise upon reading the will, but upon facts outside of it. It therefore may be cleared up by evidence *dehors* the will. Alpin I. Cameron, who was a son of Alexander I. Cameron, has never been married, and, therefore, could not, at the date of the will, have been intended as having a daughter of a marriageable age in 1879. Besides, it is shown that John had paid his addresses to Jessie Cameron before 1868, in testator's life, and with his knowledge, and seemingly without his disapprobation until John became a Romanist, as was supposed by the testator, through her influence or that of her family. There can be no doubt but that testator meant a daughter of Alexander I. Cameron, who had marriageable daughters, and not a daughter of Alpin I. Cameron, who not only had no daughter, but could have had none marriageable in 1879.

It is further contended that this condition is void, because it is in restraint of marriage, and because it requires John to do an illegal and immoral act; to violate his engagement with his present wife, made and entered into before he knew of this provision in his father's will, and, in fact, before the will was executed.

Although the law as to the validity of conditions in restraint of marriage, may be considered to a great extent unsettled, both in England and this country, yet some points are settled so as to be beyond controversy. The general rule is, that a condition in restraint of marriage in general, or of marriage to any person whatever, is void, and the devise or bequest takes effect. But any one may limit a gift to his wife to her widowhood, or may annex a condition that it shall go over on her marriage; this is a well-established exception

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the rule. So also where provision is made for the support of daughters as long as they continue unmarried and need support, where the evident intention is not to restrain marriage, but to provide support.

On the other hand, in a gift to one as long as she continues to live separate from her husband, or on condition that she live separate from her husband, the limitation or condition is void and the gift is absolute. So any condition is void that is criminal, illegal, or *contra bonos mores*.

So also it is held that a father, to whom the law gives positive control over the marriage of his children while minors, and who is at all times their proper and natural adviser and counselor in marriage connections, may annex to a gift a condition that it shall be void if his child shall marry a particular person, or one of a specified class, as a Scotchman, a Papist, a Baptist. And without question, the condition in this case that John should not marry a daughter of A. I. Cameron is valid, if it does not require him to do an illegal or immoral act, to violate a legal and binding contract to marry.

There is, perhaps, no adjudication that a condition which requires the violation of a binding legal contract to marry is a void condition, or that it is a valid one. And it is not necessary here to consider or determine that. As John was a minor until after his marriage, the contract was not legal or binding. The common law and the law of this state favor the control of a parent over the marriage of minor children. Such marriage, without consent of a father in his lifetime, is forbidden, and although not declared void, it subjects the person solemnizing it to a penalty. It is against the policy as well as the provisions of our law to allow a contract by a minor to marry to be declared valid or binding, so as to make a condition in a father's will to defeat it void, and a regard to the spirit of that law cannot be *contra bonos mores*.

On the contrary, it is the duty of the courts to favor this or any other legal means which a father may adopt to enforce the authority which the law, for wise purposes, has given to him over his minor children, and that regard for his wishes

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and counsel in the more important concerns of their lives after maturity, which the untrammelled testamentary power conferred by our law is calculated to secure.

I am of opinion that the condition is certain and is a legal and valid condition, and makes void the bequests to John; and that the direction to the executors to dispose of the estate as if John were dead in testator's life, gives to the three other children, absolutely, both the share of the fund bequeathed to John and his issue, and that part of testator's property outside of this fund, which, by the law of succession, would have gone to John but for this provision.

SLACK and PAGE, trustees, vs. BIRD and others.

1. Under a devise to trustees of a house and lot in trust for the use, benefit, and profit of M. C., R. L., and W. S. L., during their natural lives, with a further direction that upon the death of the last survivor of said three persons, the trustees should dispose of said house and lot and divide the proceeds equally among the surviving children of W. S. L. and R. L., *held*, that the word "surviving" refers to the period of distribution, and not to the time of testator's death.

2. A child of a deceased daughter of W. S. L., the last survivor of the tenants for life, who survived the testator, but died in the lifetime of W. S. L., is excluded from the gift.

3. Costs of the trustees, who have properly asked the direction of the court, and the surviving children who have answered, must be paid out of the trust fund; the daughter's child must pay her own costs.

Argued on final hearing, upon bill, answer, and proofs.

Mr. A. Brouning, for defendant Egbert.

Mr. W. B. Williams, for Aitken and others.

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THE CHANCELLOR.

The complainants, trustees under the will of George W. Bird, ask for the direction of the court in the execution of the trust. This direction involves the construction of the will in creating the trust. The will devised to them, as trustees, a house and lot in trust, for the use, benefit, and profit of M. C., R. L., and W. S. L., during their natural lives. M. C. was the wife of W. S. L., and the daughter of M. C., was testator's sister. The will further directed that, at the death of the last survivor of said three persons, the trustees should dispose of said house and lot and divide the proceeds equally among the surviving children of W. S. L. M. C. and R. L.

M. C. and R. L., at the date of the will and the death of the testator, had four children, three of whom are defendants in this suit; the fourth was Elizabeth Egbert, who died before her father, W. S. Lippincott, the last survivor of the trustees for life, leaving Ella Egbert, her only child, surviving. Ella Egbert is still an infant, and is a defendant in this

The surviving children claim that they are entitled to the proceeds of the sale, and the guardian of Ella Egbert claims that she is entitled to one-fourth, on the ground that at the death of the testator one-fourth of the remainder vested in her mother, and on her mother's death descended to her. It is claimed on the principle that the word "surviving," in the will, relates to the death of the testator, and not to the time of distribution.

The question whether, in a gift like this, of certain property for an estate for life, to the survivors of a class or of certain persons named, it vests in those of the class or persons who survive at the death of the testator, or those who survive at the termination of the life estate, or other precedent estate, is upon which courts and jurists of the highest authority differ radically, and upon principles that cannot be reconciled. The only solution in this case is to determine on which side

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is the weight of authority by which this court ought to be guided.

Mr. Jarman, in his valuable treatise on Wills, has given the history of the changes and variations in the decisions in England, with abstracts of the principal cases. 2 *Jarman on Wills*, ch. 48, III., pp. 631-658. These cases, with some American cases, are also noticed and reviewed by three of the judges of the Court of Errors in New York, in their learned and elaborate opinions in *Moore v. Lyons*, 25 *Wend.* 119.

The older decisions in England, with one or two exceptions, hold that the gift is to those surviving at the death of the testator. *Lord Bindon v. Earl of Suffolk*, 1 *P. W.* 96; *Roebuck v. Dean*, 2 *Ves.*, jun., 265; *Russell v. Long*, 4 *Ves.* 553; *Stringer v. Phillips*, 1 *Eq. Cases Abr.* 293, pl. 11; *S. C.*, 1 *P. W.* (Cox's ed.) 97 n; *Rose v. Hill*, 3 *Burr.* 1881; *Wilson v. Bayly*, 3 *Bro. P. C.* (Toml. ed.) 195; *Stones v. Heurtly*, 1 *Ves.*, sen., 165; *Perry v. Woods*, 3 *Ves.* 204; *Brown v. Bigg*, 7 *Ves.* 280; *Garland v. Thomas*, 1 *B. & P.*, N. S., 82; *Edwards v. Synnons*, 6 *Taunt.* 213; *Doe d. Long v. Prigg*, 8 *B. & C.* 231; *Haws v. Haws*, 3 *Atk.* 524.

The more recent decisions in England, and that in the House of Lords, 4 *Bro. P. C.* 574, reversing the Chancellor's decision in *Lord Bindon v. The Earl of Suffolk*, hold that the word "survivors" refers to the survivors at the termination of the previous estate, or the time of distribution of the gift. *Brograve v. Winder*, 2 *Ves.*, jun., 634; *Newton v. Ayscough*, 19 *Ves.* 534; *Houghton v. Whitgreave*, 1 *J. & W.* 146; *Daniell v. Daniell*, 6 *Ves.* 297; *Wordsworth v. Wood*, 2 *Beav.* 25; 4 *M. & Cr.* 641; *Cripps v. Wolcott*, 4 *Madd.* 11; *Gibbs v. Tait*, 8 *Sim.* 132; *Blewitt v. Stauffers*, 9 *Law Journ. N. S.*, ch. 209; *Pope v. Whitcombe*, 3 *Russ.* 124.

From these authorities Jarman concludes the established rule to be, that in such case the gift to survivors takes effect in favor only of those who survive at the period of distribution. He intimates that the case of *Doe v. Prigg* may forbid the application of the rule to devises of real estate. And since the date of Jarman's treatise the doctrine of

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Cripps v. Wolcott has been followed by Lord Romilly in *Howard v. Collins*, 5 *Eq. Cases L. R.* 349, and has been three times confirmed in the House of Lords. *Woodsworth v. Wood*, 1 *H. L. Cases* 129; *Young v. Robertson*, 8 *Jur., N. S.*, 825; *Taaffe v. Conmee*, 10 *H. L. Cases* 64. And although Lord Westbury, in his opinion in *Taaffe v. Conmee*, seems to doubt with Mr. Jarman whether the doctrine was fully settled, except as to personal estate, yet in *Woodsworth v. Wood* and *Young v. Robertson*, the gift to survivors included real as well as personal estate, and the doctrine was applied to the whole, without any distinction. The doctrine, therefore, that in such cases the word "survivors" includes only those surviving at the period of distribution, unless it is referred to some other period by words in the will, must now be considered the settled doctrine in that country.

In this country, the Supreme Court of New York, in *Moore v. Lyons*, in their opinion delivered by Chief Justice Nelson, held that in such case the survivorship refers to the death of the life tenant, and based the decision on the plain intent of the testator. 25 *Wend.* 120. This decision was reversed in the Court of Errors. Senator Bradish, the president, Chancellor Walworth, and Senator Verplanck delivering opinions founded on the conflicting decisions in England, and a nice balancing of the weight of those opinions.

In Massachusetts, the rule is established that the survivors in such case are those who survive at the death of the life tenant, and not those who survive at the death of the testator. *Hulburt v. Emerson*, 16 *Mass.* 241; *Olney v. Hull*, 21 *Pick.* 311.

In Virginia and South Carolina, the word is held to refer to survivors at the death of the testator. *Hansford v. Elliott*, 1 *Leigh* 79; *Drayton v. Drayton*, 1 *Dess. Eq. R.* 324; *Elliott v. Smith*, *Ib.* 499.

Were these cases the only guide, I should be much inclined to follow the later English decisions, not only on the ground that they have the clear weight of authority, but because they are more consistent with the rules of construction, and with

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the plain, natural, and ordinary import of the language. This, in fact, is admitted in some of the decisions to the contrary, which rest themselves upon the weight of authority alone. Sir William Grant, in *Brown v. Bigg*, and Justice Bailey, in delivering the judgment in *Doe v. Prigg*, express great doubt of the correctness of their decisions. Not only does the natural and plain meaning of words giving an estate at the death of a life tenant to the survivors of a class or of certain individuals named, refer to those then surviving, but it seems to me that no testator or draftsman who designed to provide that the whole remainder should go to those of the class who were living at testator's death, would ever use these words to express that intention, and would not fail to use words distinctly expressing the intention so formed; the words "such as may survive me," or "be living at my death," would not fail to suggest themselves.

The argument from the probability that the testator would not intend that the share given to one of a class should be defeated by his death before a life tenant, can have no weight. Few wills would stand as written, if the conjectures or speculation of a judge as to what the testator would have done had a case not provided for been suggested to him, could change the meaning from that expressed. And were the rule that such conjectures should govern the construction of the will, I think it very doubtful if a testator would divert any part of his bounty from nieces or relatives that he knew, and was attached to, for the purpose of sharing it with possible children yet to be born, whom he had never seen and could have no regard for. The old-established common law doctrine of lapse is founded on the assumption that a testator intends a gift as a personal bounty, and that an intention to extend it to heirs or children will not be presumed, but must be expressed.

But I am not at liberty to decide this matter according to my own conclusion as to the weight of conflicting authorities or the strength of the reasoning on which they are respectively founded. The question has been adjudicated in this

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court by a decision which has been suffered to stand for years as the law of this court, and which I am not at liberty to disregard; or if at all, only for reasons far more cogent than exist here.

In the case of *Van Tilburgh v. Hollinshead*, 1 *McCarter* 32, the same question arose as is presented in this case. It was there mixed with another that does not arise here. But this question was necessarily involved in the decision of the case, and was one upon which it depended and was placed. There the testator gave lands to his son William for life, and at his decease to his (William's) surviving children. The court held that only those children of William that were living at his death could take.

I find no other case in this state that touches this question, and if I had any doubt concerning it, that case as a precedent, and also from the learning and ability of the distinguished jurist who decided it, would control my decision in this.

The opinion of Chancellor Vroom in *Wintermute's Ex'rs v. Snyder's Ex'rs*, 2 *Green's Ch.* 489, relied on by counsel, does not touch the question before me. It simply decides that a gift to persons in being, of a remainder after a life estate, is a vested legacy.

But with such a mass of conflicting cases adjudged by eminent jurists, I think the trustee was not to be blamed for asking the direction of this court, and I shall order his costs to be paid out of the trust fund, together with the costs of the surviving children who have answered. The infant defendant must pay her own costs.

Tindall v. Tindall's Executors.

TINDALL vs. TINDALL'S EXECUTORS.

1. The rule of law is well settled, that a general or absolute gift of the residue of an estate will carry with it all legacies which have lapsed by the death of the legatee in the life of the testator. But this rule, like all other general rules for the construction of wills, is limited to cases where the testator has not shown a different intention; and where the testator has limited or circumscribed the residuary bequest or devise, it does not prevail, unless the terms by which it is limited include lapsed legacies.

2. If a testator, after several money legacies, gives "whatever of my property shall remain after payment of the above," to two persons named, and one of the money legacies lapses by the death of the legatee in testator's life, such lapsed legacy does not fall into the residue; but as to it, the testator is intestate.

3. In a suit by one of the next of kin of testator against his executors, where no account is called for, and where the complainant demands a certain aliquot part of a specific sum in which the other next of kin have no interest, they are not necessary parties.

This cause was argued upon bill and answer.

Mr. Emery, for complainant.

Mr. Scudder, for defendants.

THE CHANCELLOR.

The suit is brought by William Tindall, against the executors of the last will of his deceased brother, Aaron Tindall, for one-eighth part of the sum of \$5000, bequeathed by the testator to his wife, who died before him.

The testator, after the above bequest to his wife, and several other legacies, bequeathed as follows: "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning and Edward Paxton." He appointed Manning and Paxton executors.

The testator left no issue, but had eight brothers and sisters. Two of these (of whom the complainant is one) survived him.

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he other six died before him. All left children living at the death of the testator. The defendant Paxton is one of these children.

The complainant claims that the testator died intestate as to the lapsed legacy of \$5000 given to his wife; that the gift of "what shall remain after payment of the above," is a residuary bequest, and not an absolute residuary legacy, and must be construed to include only what is given by the words—that is, such estate as remains, or would remain, after payment of this \$5000 and the other legacies; and that, as one of the next of kin to the testator, he is entitled to one-eighth of his sum, which was not disposed of by the will. This is the main question in the cause.

The rule of law is well settled, both in the English and American courts, that a general or absolute gift of the residue of an estate will carry with it all legacies which have lapsed by the death of the legatee in the life of the testator. This rule was established because, in most cases, it carries into effect the intention of the testator, though it cannot be doubted that there are many cases in which it defeats it. It was necessary that some general rule of construction should be established, and this is the rule established. It is not for judges now to reason or discuss whether it was wisely established, or whether some better rule could not be adopted. I am of opinion that, on the whole, it is the best rule, and more generally carries into effect the intention of the testator. But, like all other general rules for the construction of wills, it is limited to cases where the testator has not shown a different intention; and where the testator has limited or circumscribed the residuary bequest or devise, it does not prevail, unless the terms by which it is limited include lapsed legacies.

Mr. Williams, in his treatise on the law of Executors, Vol. I., p. 1315, states that the direction that the residuary legatee shall have what remains after the payment of legacies, is such a circumscription of the bequest, and narrows the title of the residuary legatee so as to exclude him from lapsed legacies.

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The same rule is substantially laid down in *Roper on Legacies*, Vol. II., pp. 1679, 1682.

The case of *The Attorney-General v. Johnston*, Amb. 577, decided in 1769, by Lord Chancellor Camden, is a direct authority on this point. A gift of £20,000 to a charity was void, by the Mortmain act. The residuary gift was, "if my personal estate shall sufficiently reach towards satisfying all the legacies by me bequeathed, I give the remainder," &c. It was held that this would not include the void legacy, which is spoken of as a lapsed legacy. Lord Camden says: "The rule is very true, in general, that the residue takes in lapsed legacies; but then the residuary legatee must be a general legatee, to take everything that does not pass by the will. If testator had circumscribed and confined the residue, then the residuary legatee, instead of being a general legatee, becomes a specific legatee. If the testator had said none of the legacies shall, on any account, fall into the residue, it would have excluded the charities from taking the lapsed legacies. His intention appears strong, in this case, to confine the residue to what should remain of his money after the other legacies were paid."

In the will before me, the intention is yet more clearly shown, for the very words are used in which Lord Camden states the intention of the testator, as deduced from his will, "whatever shall remain after payment of the above." I cannot imagine that the testator, in using this language, could have intended that in any event the legacy of \$5000, given to his wife, should go to his executors as residuary legatees.

The rule laid down by Lord Camden is recognized and adopted in many cases since that time, which are referred to in *Roper on Legacies* and *Williams on Executors*, in the passages above referred to.

As to this \$5000, I must hold that the testator died intestate, and that the complainant is entitled to recover one-eighth of it, with interest from the expiration of one year after the death of the testator, upon giving the proper refunding bond -

An objection was made at the hearing, for want of proper

 Deveney v. Mahoney.

ties. The other next of kin have not been made parties. It is not necessary in a case like this, where no account is demanded for, and where the complainant demands a certain part of a specific sum in which the other next of kin have no interest. Each has a like right to a different aliquot part of the same sum. The suit is brought for the complainant, and such of the next of kin as may choose to join with him. This is, at most, all that is necessary. *Brown v. Rickards*, 3 Johns. Ch. 553; *Wiser v. Blachly*, 1 Johns. Ch. 438; *Richard v. Hicks*, 1 Paige 270; *Story's Eq. Pl.*, §§ 207 a,

 DEVENEY vs. MAHONEY.

Land bought with partnership funds, although the title be taken in the name of one of the partners, will be treated in equity as partnership property.

The same principle applies to improvements made with partnership money on the separate property of one of the partners.

It is not necessary that judgment should be first obtained against the partner in whose name the title is vested, to enable a partner to maintain a bill in equity for an account, and to have the property declared partnership assets.

The rule that a fraudulent or voluntary transfer of property cannot be set aside by a creditor at large, but only by one who has obtained a judgment that would be a lien upon the property if not transferred, is well established, but does not apply to a partner calling on a co-partner to contribute.

Where a part of the purchase money of the property alleged to have been fraudulently conveyed by a partner remains unpaid at the time of the bill for account against him, the grantee, as to that amount, is not a purchaser for value without notice. And the property is liable to that extent, with interest from the date of the conveyance, provided so much of partnership funds have been expended thereon.

The case was submitted upon briefs, on final hearing upon bill, answer, and proofs.

Deveney v. Mahoney.

Mr. Dixon, for complainant.

Mr. Ransom, for defendants.

THE CHANCELLOR.

Francis Deveney, the complainant, had been a part the defendant, Thomas Mahoney. They were carpe their business was building. The partnership was dissolved by consent. The debts of the firm far exceeded their unless the amount expended on the lot of Mahoney is oned in the assets. Mahoney, after the dissolution, reft contribute to the payment of these debts, and left the leaving Deveney to pay the debts. He first conveyed real estate, being a lot in Brunswick street, Jersey C his brother, the defendant, John Mahoney. John retained his hands \$1000 of the purchase money, which he has not paid or secured.

Part of the partnership means were expended in building a house on this lot of Thomas Mahoney, which was his property, bought with his own money, and never, in any put into the partnership; the dwelling-house so built intended for his separate use. There was also erected this lot out of the means of the firm, a carpenter-shop, was intended for the use of the firm, and was used by This shop John Mahoney does not claim, and, in his opinion, says he is willing that Deveney may remove it.

Deveney having paid the partnership debts to a considerable amount beyond his share, and being liable for the brings this suit to have the accounts of the partnership judged and settled, and to have the lot conveyed to declared partnership assets and liable to Thomas' share partnership debts, and to have the deed to John Mahoney declared void against the creditors of the firm. Thomas not answered, and the bill has been ordered to be taken confessed against him. John Mahoney answers that he bought the lot of Thomas without any intent to defraud creditors, and paid a valuable consideration, and insists

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title is valid as against the complainant and the creditors of the firm. But in his evidence he admits that he owes Thomas \$1000 of the consideration, which is still unpaid.

It is a well-settled part of the law of partnership, that if land or other property is bought with the partnership funds, though the title may be taken in the name of the individuals composing the firm, or in the name of one of them, yet the same is to be treated in equity as partnership property, and is to be sold and accounted for by a surviving partner as personal property. *Collumb v. Read*, 24 N. Y. R. 505; *Burton v. Sumner*, 2 Barb. Ch. 165; *Delmonico v. Guillaume*, Sandf. Ch. 366; *Baldwin v. Johnson*, Saxt. 441; *Mallack v. James*, 2 Beas. 126; *Holdrege v. Gwynne*, 3 C. E. Green 6; *Uhler v. Semple*, 5 C. E. Green 288.

The case of improvements made with partnership funds on the real estate of one partner would seem to come, *pro tanto*, within the same principle. But it is in such case difficult of application, and is not directly established by the cases cited and the numerous English and American cases on which these are based.

But the Supreme Court of New York, in the case of *Averill v. Loucks*, 6 Barb. 19, held that a sheriff's sale under a judgment against one partner, would convey the separate real estate of that partner, subject to equitable claims of the other partner and the creditors of the firm, to the improvements put on the land with partnership funds; and this, although the judgment was docketed before the improvements were made.

In *King v. Wilcomb*, 7 Barb. 263, the same doctrine was applied to the trees and shrubbery planted by the firm as nurserymen on the lands of one partner. The partner owning the land sold it. In a suit by the other partner against him and the purchaser, to have these trees and shrubbery declared partnership property and accounted for, the claim was sustained. The Superior Court, in *Smith v. Danvers*, 5 Sandf. 669, held and enforced the same doctrine.

In these cases and those before cited, as to land itself pur-

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chased with partnership funds, the suit was by one partner who had not obtained judgment against his co-partner, in whose name the title was in part or wholly vested, though no question was raised on that ground.

But in *Wade v. Rusher*, 4 Bosw. 537, this question was raised, and it was held that it was not necessary to have such judgment. The opinion on this point declares "that where real estate has been purchased with partnership funds, each partner has an equitable lien upon it, not only as representing creditors to secure their rights through such lien, but for payment of his own eventual demand. If the title is taken in the name of one, he is a trustee, and the co-partner a *cestui que trust*. This equitable lien may always be successfully asserted against the partner, against his heirs, devisees, or his voluntary assignees for value without notice."

These cases all depend upon this doctrine of trust, which takes them out of the rule in case of creditors contesting a fraudulent or voluntary transfer of property, which cannot be done by a creditor at large, but only by such as have obtained a judgment that would be a lien upon the property if not transferred. That rule insisted upon by the counsel of the defendant is well established, but does not apply to a partner calling on a co-partner to account.

John Mahoney, at the filing of the bill, had \$1000 of the consideration in his hands; as to that amount he is not a purchaser for value, without notice; and as that appears sufficient to pay the claim against Thomas, it is not necessary to consider whether, as to the residue, he was a purchaser with notice.

There must be a decree for an account, and that the property conveyed to John Mahoney shall be liable to the amount found due from Thomas to the firm or its creditors, to the extent of \$1000, and the interest thereon from the date of the conveyance, provided so much of the partnership funds were expended in improvements on the lot conveyed to him.

Manhattan Manufacturing and Fertilizing Co. v. Van Keuren.

THE MANHATTAN MANUFACTURING AND FERTILIZING
COMPANY vs. VAN KEUREN.

1. Upon the argument of a rule to show cause why an injunction should not issue in a case where an injunction had been granted in part, the question whether the existing injunction should not be removed, cannot be considered. That can be removed only upon notice and motion to dissolve, in accordance with the rule of the court.

2. Any citizen, acting either as an individual or as a public official, under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it property may be destroyed, and the owner deprived of it without trial, without notice, and without compensation.

3. Such destruction for the public safety or health, is not a taking of private property for public use, without compensation or due process of law, in the sense of the Constitution.

Mr. T. N. McCarter and *Mr. J. B. Vredenburg*, for complainants.

Mr. Gilchrist, Attorney-General, and *Mr. McGill*, for defendant.

THE VICE-CHANCELLOR.

The complainants are engaged in manufacturing a fertilizer, and carry on their business in Jersey City, near Communipaw bay. The fertilizer is made of the blood of animals killed at the abattoir of the New Jersey Stock Yard and Market Company, a portion of whose premises is occupied by complainants. The blood is carried about one hundred yards, to complainants' factory, and is there boiled. When thus cooked, and in solid form, it is mixed with sulphate of soda, or salt. It is then dried in an oven, and being mixed with other substances, is ground in a mill, and becomes ready for use. The complainants commenced business at their factory in October, 1870, and continued it till July last, when interrupted by the acts of the defendant which have occasioned this suit.

 Manhattan Manufacturing and Fertilizing Co. v. Van Keuren.

The defendant, Benjamin Van Keuren, is the street commissioner of Jersey City, and, as such, on the 1st of July last gave notice to the complainants that, upon complaint made to him, he had entered their premises, and ascertained there the existence of a nuisance, in violation of an ordinance of the city; that such nuisance consisted of putrid and decaying animal matter and offensive substances, emitting noxious and unwholesome smells, and requesting complainants to abate the same within twenty-four hours.

The notice being disregarded by complainants, the defendant, with twenty-five policemen and others, about one o'clock in the night of the 18th of July, entered their factory by force, and proceeded to abate the alleged nuisance, by taking off the eccentric rods of the machinery for grinding the baked blood, removing the belting or gearing, damaging and carrying off parts of machinery and property, and committing other acts to put a stop to complainants' works. The character and extent of the damage inflicted and threatened to be inflicted, are differently stated by the parties, but while said by the defendant to have been necessary and lawful, are not deemed to have been important.

On the 24th day of July, the complainants exhibited their bill of complaint, and an injunction was ordered by the Chancellor to a part of the extent prayed for in the bill. It restrained the defendant from destroying, breaking, or injuring any of the machinery or gearing, from burning complainants' factory, and from burning or destroying any of their property. In addition to this, the bill asks that the defendant be further restrained from resorting to any forcible proceedings to hinder or impede the operation of complainants' works, till they be lawfully adjudged to be a nuisance.

The order granting the injunction to the extent above stated, directed the defendant to show cause before the Vice-Chancellor why an injunction should not issue pursuant to the prayer of the bill.

The rule to show cause has been argued upon bill, answers and affidavits, and was claimed by defendant's counsel

 Manhattan Manufacturing and Fertilizing Co. v. Van Keuren.

ent for discussion and decision the question whether the
 ting injunction should not be removed, as well as the
 sition whether the additional injunction referred to in the
 should not be allowed. This claim is not warranted, I
 k, by the language or the spirit of the rule. The existing
 nction can be removed only upon notice and motion to
 olve. Without such notice and motion, I shall not assume
 onsider the propriety of its continuance. It prohibits
 ible proceedings by the defendant to a certain extent, and
 a certain specific kind. It may properly be regarded as
 ending on principles and reasons not applicable to the in-
 ction referred to in the rule to prohibit all forcible pro-
 lings whatever. The proper exercise of powers within the
 its of a reasonable discretion, is one thing: the abuse or
 version of them, is another. The latter may be restrained,
 le the former will not. Whether or not there has been
 h abuse, I do not mean to decide or to intimate, but simply
 point out the plain and important distinction. It may be
 ful to purge premises of a nuisance, and unlawful to burn
 lestroy them. How much force, or what kind, may be
 issible in abating it, is obviously a different inquiry from
 permissibility of any.

The insistent of the complainants is, that the street com-
 ssioner has no right to use any force till their business or
 rks shall have been lawfully adjudged to be a nuisance;
 t the ordinance, by its terms, does not give the right, and
 t does, it is so far illegal and invalid; that the city charter
 s not authorize the passage of such an ordinance, and if it
 s, its provisions to that effect are unconstitutional and void.
 The fourth subdivision of the twenty-fourth section of the
 rter gives power to the Board of Aldermen "to declare
 at shall be nuisances in lots, streets, docks, wharves, or
 rs, and to provide for the removal, sale, and other disposi-
 n of all such nuisances." *Pamph. Laws 1871, p. 1107.*

The ordinance was approved August 18th, 1871. By sec-
 a first, "all slaughter-houses or other buildings, whence
 ensive smells are emitted, are declared to be nuisances."

 Manhattan Manufacturing and Fertilizing Co. v. Van Kenren.

By other sections, the street commissioner, upon complaint made, is empowered to enter any building or premises to ascertain if a nuisance exists, and on ascertaining that it does, to give notice requiring its abatement within twenty-four hours, and if such notice be disregarded, to proceed to abate it by the removal of such portions of the machinery, or other matter or thing, as may be necessary for the creating of the nuisance, and to take the same to the public yard of the city for sale.

This ordinance is assailed as authorizing unreasonable searches and seizures; the taking of property without due process of law; the conviction of an offence without being heard; the deprivation of trial by jury, and the taking of private property for public use, without compensation.

Whether their business or works are a nuisance or not, the complainants say, is a question which should be determined by a legal tribunal in a trial in which they can be heard; that the street commissioner cannot himself adjudge their works to be a nuisance, and proceed to abate them, without a violation of their lawful and constitutional rights, which this court will restrain. Such violations are, in some cases, enjoined, though the party has a remedy at law; and as the complainants' present application cannot stand upon the ground of irreparable wrong, it must be placed upon their strict constitutional rights. In that view, an injunction will not issue, if the legal questions are uncertain, or open to dispute; the party will be left to his action at law, where such controverted questions can be determined by the courts of law whose appropriate province it is to determine them. But, in this case, can they be said to be fairly matters of doubt? Notwithstanding the ability and learning with which the complainants' case has been urged, I am of opinion they cannot. I think it quite clear that the constitutional limitations discussed by their counsel, and illustrated in the cases referred to at the argument, have no application to the power of a municipal government to pass ordinances for the control of

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ment of nuisances, nor to the provisions of the ordinance
 tion in this suit.

common law, it was always the right of a citizen, with-
 official authority, to abate a public nuisance, and without
 ing to have it adjudged such by a legal tribunal. His
 to do so depended upon the fact of its being a nuisance.
 assumed to act upon his own adjudication that it was,
 such adjudication was afterwards shown to be wrong, he
 liable, as a wrong-doer, for his error, and appropriate
 ices could be recovered against him. This common law
 still exists in full force. Any citizen, acting either as
 individual or as a public official under the orders of local
 unicipal authorities, whether such orders be or be not in
 uance of special legislation or chartered provisions, may
 what the common law deemed a public nuisance. In
 ng it property may be destroyed and the owner deprived
 without trial, without notice, and without compensation.
 destruction for the public safety or health, is not a taking
 rivate property for public use, without compensation or
 process of law, in the sense of the Constitution. It is
 ly the prevention of its noxious and unlawful use, and
 nds upon the principles that every man must so use his
 erty as not to injure his neighbor, and that the safety of
 ublic is the paramount law. These principles are legal
 ims or axioms essential to the existence of regulated
 ty. Written constitutions pre-suppose them, are subor-
 te to them, and cannot set them aside. They underlie
 justify what is termed the *police power* of the state. By
 ie of that power, numerous and onerous restrictions and
 ens are imposed upon persons and property which, for
 purposes or on other grounds, would be prohibited by the
 itutional limitations sought to be applied in this suit.
ry on Const. Lim. 572; *Potter's Dwaris on Statutes* 444.
Coe v. Schultz, 47 *Barb.* 64, a case not cited at the argu-
 ; the nature of this power and its exercise for the sup-
 sion of nuisances, are fully and clearly exhibited. The
 opolitan Board of Health made an order that the manu-

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facture of poudrette at Hunter's Point be forthwith discontinued, until the mode of it should be so altered that no odor or fumes could escape into the external air; and that the order be executed by the police. A temporary injunction restraining such execution was dissolved upon argument. Constitutional objections were set up against the validity of the order, and its execution resisted, because depriving the defendant of property without due process of law. "No one, it was there said by the court, "has probably ever suggested that Magna Charta interfered with the process of summarily abating a public nuisance. If the abatement involved the deprivation of property, the owner was deprived of his property by due process of law, if the thing abated was a public nuisance; for then the summary process of abatement was authorized by the common law, and any process authorized by law must be due process. The common law was adopted by our state Constitution, and if this summary process was due process, within the meaning of Magna Charta, there was no room for doubt that it is due process, within the meaning of our state Constitution." Again, it was said "the defendants have justified, or undertaken to justify, their proceedings as public officers under the metropolitan sanitary act; but the business or manufacturing process was a public nuisance; how can I, in deciding this motion, disregard the common law rights of the defendants as *citizens* to abate the nuisance? I see no principle on which I can."

In the present case the complainants deny that their business or works are a nuisance. The defendant avers that they are, and affidavits are offered on both sides in support of the assertions. In the view I take of the case, the defendant is at his peril. His own adjudication of the fact of a nuisance will not protect him, as would the judgment of a court. It was said at the argument that actions had been commenced against him for the recovery of damages, and are now pending. It is unnecessary for me now, and in my judgment would be improper to express an opinion upon the question

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be determined in such actions. It is sufficient to say that affidavits to show the offensive and noxious odors emitted pervading at times the vicinity of the works, are numerous and explicit. They are sufficient to prove that the commissioner's conclusion as to character of complainant's business and works, was not entirely without evidence to support it. The correctness of the conclusion is not now to be determined.

For the reasons that no violations of the complainants' constitutional rights are shown to be threatened, such as this court may, in some instances, interpose to prevent, and that complainants' damages, if any shall be sustained, are not shown to be irreparable at law, I am of opinion that the application for the injunction must be denied.

Costs to abide the event of the suit.

 WATSON vs. MURRAY and others.

1. Uncertainty in material allegations is not fatal to a bill whose object the discovery of material facts alleged to be entirely in the defendant's knowledge.
2. A bill by a partner of a lottery firm against his co-partners for discovery, for a sale of the property, and a distribution of the proceeds, will not be entertained by this court.
3. Even were the partnership contracts entered into in such states where such contracts are legal, this court will not enforce or administer them.
4. A contract which, though valid and would be enforced in the state where it was made, is in violation of a public law of this state, will not be enforced here, on the ground of comity.
5. It will not avail the complainant that his suit is not to enforce an illegal contract, but simply to compel an account and distribution of profits already made. Such distinction cannot be invoked where the illegal act is also a misdemeanor, punishable by fine or imprisonment.

The argument was had before the Vice-Chancellor, on demurrer to the bill.

Watson v. Murray.

Mr. I. W. Scudder, for demurrer.

Mr. L. Zabriskie and *Mr. Knapp*, contra.

THE VICE-CHANCELLOR.

James S. Watson, the complainant, was one of a firm engaged in the business of lotteries, and his bill is filed to obtain a discovery from the other partners, or some of them, of the profits and assets belonging to the firm; to have the partnership dissolved, a receiver appointed, the property sold, and the proceeds distributed among the partners according to their respective rights.

The bill alleges, in substance, that Charles H. Murray and twenty-one others besides the complainant, had been for three years associated under the name of C. H. Murray & Co., owning lottery franchises, granted by the states of Missouri, Virginia, Kentucky, and Louisiana; that the legislation creating them was designed to raise money for lawful and commendable purposes, but the complainant is unable to set forth the dates or particulars of the several statutes composing it; and prays that the defendants may discover the same in their answer. It alleges that the lotteries were drawn and the business carried on in the above-mentioned states, or some of them, and in accordance with their laws; that lotteries and lottery franchises are lawful property in said states, and that contracts growing out of the same are there upheld and protected. It alleges that the property of the firm was divided into one hundred and twenty shares, of which the complainant owns two and one-half, and for which \$20,000 were paid by him; that the defendants, or some of them, who have charge of the business, have realized large sums and have appropriated or invested them in their own name, and refuse to give any account thereof; that they have possession of all the books, papers, and muniments of title, and that the complainant is unable to get access thereto or any information respecting them.

The defendants, by whom the business is charged to have

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been mainly conducted, are Charles H. Murray, Zachariah E. Simmons, John A. Morris, Benjamin Wood, William E. France, Charles T. Howard, Jacob Bausch, and Lewis Davis.

A demurrer has been filed by Murray, the only defendant served with process or appearing to the suit. The causes of demurrer are special and general, the former being the uncertainty and defective averments of the bill, and the latter the substance or subject matter of it. The subject matter, it is said, is such as this court will not take cognizance of, and that if this were not so, the allegations of the bill in regard to the particulars of the lottery grants, the assignments of them to the firm, and the nature and location of the property, are all too indefinite and vague to entitle the complainant to an answer. The want of certainty in these respects, and in others not assigned in the demurrer, would undoubtedly be fatal if the bill were not one for discovery. But the complainant insists that he is utterly unable, more specifically, to set out his title, because his sources of information are entirely in the defendants' possession. It is conceivable that a partner might embark in a legitimate business, relying on his associates, without having or retaining any more specific information respecting it than is disclosed in this case, and if he had so invested his money and become subject to the co-members of the firm, no rule of pleading could possibly prohibit his right to discovery. On the contrary, the defendants, however meagre the allegations of the bill, would be held to supply the deficiencies. This is the very object to be gained by the suit.

But is the suit itself, in the most favorable statement to be made of it, one which this court will entertain? It seems to me plain that it is not. Its object is to consummate a partnership contract, entered into and continued exclusively for the prosecution of an illegal and mischievous business. By the law of New Jersey, lotteries are common and public nuisances. Any one selling or disposing of a ticket in a lottery, whether erected, opened, or made in this state or elsewhere, is guilty of a misdemeanor, and on conviction punishable

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by fine and imprisonment. Every bargain, sale, conveyance, or transfer of any goods, chattels, or lands, made in pursuance of any such lottery, is invalid and void. These provisions are a part of the act of February 13th, 1797. The hostility they exhibit to lotteries, whether organized in this state or out of it, is, and has long been the settled policy of the state. This policy is manifested in our state Constitution, and is incompatible with any exercise of comity, by which lottery contracts or lottery transactions, however lawful in other states, can be recognized and enforced by our courts. Whether the partnership contract in this case was entered into by the complainant in this state, where it would be illegal and void, or in states where it may have been legal, does not distinctly appear. It is to be presumed from the pleadings that it was entered into here. But putting the case in its best possible shape, and assuming that all the contracts and transactions involved in it occurred in states where they were tolerated by law, my opinion is that this court will not undertake to enforce or administer them.

In 2 *Kent's Comm.* 457, it is said: "There is no doubt of the truth of the general proposition, that the laws of a state have no binding force beyond its territorial limits; and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*. Every independent community will judge for itself how far the *comitas inter communitates* is to be permitted to interfere with its domestic interests and policy. It may be laid down as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation, and obligatory force in every other country, which they have in the country where they were made. The admission of this principle is requisite to the safe intercourse of the commercial world, and to the due preservation of public and private confidence; and it is of very general reception among nations. It is, however, a necessary exception to the universality of the rule, that no people are bound to enforce or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violate

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a public law." The gambling operations of lotteries are within these exceptions. They were insisted at the argument to be *mala prohibita*, and not *mala in se*. I think they are to be taken judicially, if not abstractly in ethics, as *mala in se*; bad in their nature, and bad in their results; notoriously prejudicial to the interests and the morals of the public. Their enticing illusiveness is a fraud. They were described nearly a century ago in Adam Smith's *Wealth of Nations*. "The world," he says, "neither ever saw, nor ever will see, a perfectly fair lottery, or one in which the whole gain compensated the whole loss; because the undertaker could make nothing by it. There is not a more certain proposition in mathematics, than that the more tickets you adventure upon, the more likely you are to be a loser." But it is wholly superfluous to enlarge on the pernicious and illegal character of the business, or do more than state it. It is eminently one to which the maxim applies *ex turpi causa non oritur actio*. "The objection," says Lord Mansfield, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Holman v. Johnson*, *Cowp.* 343.

But it was contended for the complainant, and the argument of his counsel went mainly on the ground, that the court, in this case, is not asked to do anything in furtherance of lotteries, or to enforce an illegal contract, but simply to compel an accounting and distribution of the profits. This distinction between enforcing illegal contracts and asserting title to money which has arisen from them, has been taken in authoritative cases, which were strongly urged and relied on at the argument.

In *Sharp v. Taylor*, 2 *Phillips* 801, it was held that one of two partners who has possessed himself of the property of the firm, cannot be allowed to retain it, by merely showing that on realizing it some provision of some act of Parliament has

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been violated or neglected. The parties there were joint owners of a vessel. Freights had been earned in her voyages, and the vessel had been sold. The partners holding the proceeds of sale and the freights, set up violations of the laws regulating navigation and freights as a ground of defence in a suit for account. The alleged violations of law, Lord Cottingham said, were not any fraud upon the revenue, or omission to pay what might be due, but at most an invasion of a parliamentary provision supposed to be beneficial to the ship-owners of the country—an evil, if any, which must remain the same, whether the freight was or was not divided between the parties according to their shares. But the partners, in that case, did not enter into partnership to carry on an illegal business, or, so far as appears, to violate the law, in the prosecution of a legal one. Some part of the partnership gains appeared to have resulted from a breach of a purely positive law. The court directed an account of the whole.

In *McBlair v. Gibbes*, 17 *Howard* 232, and in *Brooks v. Martin*, 2 *Wallace* 70, the distinction expressed by Lord Cottingham in *Sharp v. Taylor*, is recognized and approved.

In *McBlair v. Gibbes*, the claim sought to be recovered, grew out of a contract with one Mina, in 1816, for advances and supplies in fitting out a military expedition against the dominions of the king of Spain. But the contract relied on by the plaintiff was, in that case, not the original one in contravention of the act of neutrality, but was subsequent, collateral to, and wholly independent of it. The distinction on which the decision was made, was not between enforcing the illegal contract and distributing its proceeds, but the distinction between an original contract tainted with illegality, and a later one not affected by the taint. In *Brooks v. Martin*, the business of the firm related to the purchase and sale of bounty land warrants and scrip, a traffic which the act of Congress prohibited. The object of the act was to protect soldiers against improvident contracts, and while the assets of the firm were adjudged to have resulted from such contracts, the partner holding the assets was decreed to account

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e other, and pay over his share; the court saying that it difficult to see how the statute enacted for the benefit of oldier would be made more effective by leaving one to on to the whole of the property, instead of executing e between himself and his partner.

it, in these cases, as well as in other cases which are in cited and reviewed, the partnership was in no instance ed and conducted for a traffic which the law made a e and a nuisance. The distinction between enforcing the tion of an agreement to do an illegal act, and the distri- on of the realized profits of the act, made use of in those to do justice between the parties, is obviously not to be ded as one of universal or general application. It would . needless to say that it cannot be invoked to apportion ng criminals the gains resulting from their crimes. No has been referred to, and none, I am sure, can be found, e the illegal act has been also a misdemeanor, punishable ne and imprisonment, for the protection of the public y and morals. Where such is the fact, the distinction is ided by manifest considerations of example and influ- ; considerations not deemed to exist in the cases where listinction was allowed. I cannot regard the authorities d on in this case as at all available to maintain it.

1 *Watson v. Fletcher*, 7 *Grattan* 1, a suit to effect a set- ent of transactions growing out of a partnership for gam- g, the Supreme Court of Appeals of Virginia refused to relief, declaring it clear that a court of equity would not its aid in such cases to either partner against the other. also *Alford v. Burke*, 21 *Ga.* 46; *Abbe v. Marr et al.*, *Id.* 210; *Spalding v. Preston*, 21 *Vt.* 9.

1 the latter case, it was said that courts of justice will not in actions in regard to contracts or property which have heir object the violation of law. If a gang of counter- rs had quarreled about the division of their stock or tools, art of justice could hardly be expected to sit as a divider een them.

' this lottery firm had made its contracts, sold its tickets,

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and accumulated its property in New Jersey, the above language of Chief Justice Redfield would appropriately describe it. This being true, no principles of comity can render it, if carried on elsewhere, legitimate or reputable here.

I shall advise that the bill be dismissed, with costs.

TUNNARD vs. LITTELL.

1. When a trust is sought to be raised as a resulting trust from the purchase money, the proof must be clear of the payment of the purchase money by the person in whose favor a trust is sought to be raised. Such a trust must also arise at the time of the execution of the deed. It cannot be raised from subsequent matter arising *ex post facto*.

2. An agreement to convey from one married woman to another, is inoperative and void.

3. To a bill by a *feme covert* by her next friend for her separate estate, her husband is a necessary party.

This cause was argued before the Vice-Chancellor, on bill, answer, and proofs.

Mr. J. Whitehead, for complainant.

Mr. G. F. Tuttle and *Mr. Keasbey*, for defendant.

THE VICE-CHANCELLOR.

The complainant, Mary M. Tunnard, wife of William F. Tunnard, by her next friend, John I. King, files her bill of complaint against Emma S. Littell, alleging that she holds in trust for complainant an undivided half interest in two lots making together about eight acres of land, situated in Monclair, in the county of Essex, and praying that she be decreed to execute to the complainant a deed of conveyance thereof.

The lands were conveyed to the defendant by different parties, by two several deeds, on the 3d day of May, 1859, for

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the total consideration of \$4000. She was the wife of William M. Littell, who afterwards died in January, 1862. At the date of the deeds, her husband was one of the firm of Hedenberg & Littell, carriage-makers, in Newark, in this state. William F. Tunnard, the husband of complainant, resided in Baton Rouge, Louisiana, and was on intimate personal terms with Littell, having business connections with his firm.

The complainant alleges that the lands were conveyed to defendant in pursuance of an agreement between Littell and his wife, of the one part, and herself of the other part, for the purpose of homesteads thereon for their families; that, by said agreement, she and Mrs. Littell were to be equally interested in the premises; that each of them was to pay one-half of the price and expenses, and Mrs. Littell to take the title in trust for herself and complainant; that afterwards, and some time in 1859, Mrs. Littell signed and delivered to her a written agreement, certifying that the land was purchased and held jointly for herself and Mrs. Tunnard—the one-half held in trust for the latter to be conveyed to her when desired, through her husband, or in person; that this agreement has been lost, or mislaid, or cannot be produced; that in pursuance of the above agreement for purchase, the husband of complainant paid for her to Mr. Littell one-half of the cash payments made on the purchase, and that the moneys so paid by her husband amounted to \$1349.29; that his last payment was made on the 12th of November, 1860, since which time the complainant has never been called on for further payments, though always ready and willing to pay whatever was her share; that during the late civil war her husband and herself resided in Baton Rouge, and were unable to make inquiries or obtain information of the premises; that in September, 1866, her husband was at Newark and called upon Mrs. Littell, who refused to convey to complainant any part of the land, or give him the information he desired in respect to it.

The bill was filed in September, 1866. The defendant, by

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her answer, denies that she received the title in any wise in trust for the complainant, but alleges that when the premises were conveyed to her she supposed it to be for her use and benefit alone, and that she had no knowledge of any arrangement made with the complainant concerning the same; that the purchase occurred in consequence of a visit made by her and her husband in the neighborhood, in the spring of 1859, when she was pleased with the situation, and requested her husband to buy it for her as a residence; that the purchase was made and the deed delivered to her before any proposition was made that the complainant, or any other person, was to have an interest in the premises; that afterwards her husband informed her that it was arranged that Mr. Tunnard was to take half of the premises, as she understood, for his son, Frederick D. Tunnard, and not for his wife, the complainant; that she strenuously objected, whereupon her husband insisted that he had made the arrangement and must carry it out, and brought to her two deeds, dated the 30th of July, 1859, from him and herself to Frederick D. Tunnard; that overcome by his urgency she signed them, but when separately examined by the commissioner she refused to acknowledge them, and they were left in her possession; that afterwards her husband brought her a paper, which he said was a paper showing that the said Frederick D. Tunnard owned a half interest in the property, and peremptorily insisted that she should sign it, which she did, in order to avoid a difficulty with him, and being solemnly assured by her husband that Tunnard should not have an inch of the property, as Tunnard already owed him a larger sum than his share of the purchase money, and that it was a mere form, and not of the nature of a deed.

It was contended at the argument, that the complainant was entitled to a decree upon the ground either of an express or a resulting trust. That it cannot be upon the latter, is clear. The evidence of Tunnard and his wife is explicit upon the point that no part of the funds advanced by Tunnard to Littell, and used by the latter in the purchase, belonged to the

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complainant, or was her separate estate. They were entirely the moneys of her husband. The evidence is clear that the business was done by her husband; that she had no personal knowledge of the price or terms of the purchase. She testifies that she never heard any conversation between Littell and his wife, or either of them, with herself or with her husband, relative to the purchase, before it was made. Her knowledge of it was derived months afterwards from her husband. This is in direct contradiction of the agreement set forth in the deed, and is fatal to the maintenance of a resulting trust. When the trust is sought to be raised as a resulting trust from purchase money, the proof must be clear of the payment of the purchase money by the person in whose favor a trust is sought to be raised. Such a trust must also arise at the time of the execution of the deed. It cannot be raised from a subsequent matter arising *ex post facto*. *Cutler v. Tuttle*, 4 *E. Green* 549.

Nor can the complainant's case be maintained, in my judgment, on the ground of an express trust, created by the paper which is alleged to have been given to Mrs. Tunnard. It is doubtful, from the proofs, whether the paper was given to her or to her son, Frederick D. Tunnard. I am inclined to the belief that it was given to the latter. Tunnard and his wife, and their son, were examined upon interrogatories, and all testified that it was made to her, but the documentary evidence afterwards adduced tends strongly to show that, in speaking of this time years after the paper was lost, their memories are wrong. When the purchase was made, Tunnard, the elder, was largely indebted to parties in New Jersey, and was endeavoring to effect, through Littell, a compromise settlement. This was proved by his letters, offered by the defendant and made exhibits in the cause. In his testimony he says: "The purchases were made for the joint interest of Mrs. Littell and Mrs. Tunnard; the deeds were made to Mrs. Littell, she giving my wife a simple obligation setting forth the facts, and agreeing to hold one-half in trust for her." The agreement was made, he says, in the winter of 1858 or 1859, and

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concluded in the summer of 1859, at Mr. Littell's house in Newark. But in his letter to Littell, which the defendant afterwards produced, he writes under date of March 23d, 1859: "I am glad you have succeeded in getting the mountain home. If you get the title I will either send you a check for my half of the cash payment, or you can draw on me at such times as you may think proper, taking care not to mature a draft on me in September, as I will not be here. If you have the title made, have the undivided half deeded to F. D. Tunnard, and I will arrange all satisfactory when I come on." He did not come on till the following summer, several months after the deeds had been given to Mrs. Tunnard. Writing again on the 27th of April, 1859, he says, speaking of the lands: "I wish you would send on a copy of the sale, so I can have before me the whole matter and acknowledge receipt of the payment I have made in Fred's name. You know I must not appear in the purchase at present. I will declare my residence there when I come on, and then I can make all right after a while." And yet in his testimony, before his letters were produced, he says that his son Frederick D. Tunnard's name was never, to his recollection, mentioned in any way or manner in connection with his having an interest in the premises; that it was never contemplated or agreed that he should have an interest. His wife and his son testify to the same effect; the testimony of all three illustrating the uncertainty of their recollection, and the danger of relying on their memory to establish the contents or legal effect of a paper executed and lost many years before. That the paper signed by Mrs. Littell was to the son and not the complainant, is testified to by Mrs. Littell, and is rendered further probable by the fact that two deeds for the undivided half parts of the two tracts which the complainant seeks to recover, were drawn of the date of July 30th, 1859, to the son, in accordance with the directions contained in the father's letters. These deeds were signed by Littell and wife, but were never delivered; the latter refusing to acknowledge them before the commissioner. They are exhibits in the cause. I cannot regard the

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contents and effect of the paper as sufficiently proved to make the basis of a decree.

But suppose it to have been made to Mrs. Tunnard. What is its effect? It is alleged to have been an agreement to convey an undivided half interest, whenever required. It was made long after Mrs. Littell became seized of the fee. It formed no part of the transaction of the purchase. The complainant's case, as made by the bill, assumes that it did, but the evidence makes it certain it did not. Mrs. Littell's testimony is, that her separate property was sold by her husband at her request and used in the purchase. Afterwards he told her what she admits she discovered, after his death, to be true, that Mr. Tunnard had paid him moneys for an interest in the land, and against her will she signed an agreement to convey; whether to the complainant or her son, makes no difference in respect to consideration, for it is not alleged that a consideration proceeded from either. It was an agreement to convey from one married woman to another, and is plainly inoperative and void. Another difficulty is this: the bill is filed by a *feme covert* by her next friend, for her separate estate. Her husband is not joined as a party, and the answer excepts to the omission, praying the same advantage as if the defendant had demurred. This exception is well taken. In *Johnson v. Vail*, 1 *McCarter* 428, it was held that in a suit by a wife for her separate estate, the husband is a necessary defendant. The declaration is there quoted as authoritative, that "there are numberless cases in which the wife has been allowed, through the medium of her *prochein amy*, to sue her husband in respect to her separate property; but I have not been able to find any case, either at law or in equity, in which she has been allowed to sue or be sued by a stranger, merely in respect of her separate property, without her husband being plaintiff or defendant."

The case itself, in its general character, presents but little to entitle it to the favorable regard of a court of equity. The husband of complainant, in his business with Littell, undoubtedly paid something to be invested in the purchase of these

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lands. He did not wish it to be known, because his creditors in New Jersey were numerous and their demands considerable. This was the understanding between himself and Littell. Neither this fact nor the fact that he paid anything appears to have been known to the defendant. The payment and credits allowed him by Littell, on the books of his firm exceed, by \$200, or thereabouts, his general indebtedness to the firm at the opening of the war, which indebtedness still exists. The present suit is, in reality, plainly his own, in the name of his wife; and in whatever aspect it is viewed, appears to me incapable of being maintained.

I shall advise that the bill be dismissed, with costs.

CLOS and wife vs. BOPPE and others.

1. Stated generally, the law is that when the mortgagee purchases the equity of redemption of the mortgagor, his mortgage interest is extinguished. But this general doctrine is subject to qualifications. Merger is not favored in equity, and is never allowed, unless for special reasons and to promote the intention of the party.

2. Where the equities are subserved by keeping the mortgage alive, and no injury or injustice is thereby wrought, it is not extinguished.

3. Where the mortgaged premises were conveyed to a mortgagee, though not purchased by him, and he did not derive, or expect to derive, any benefit from the conveyance, and it was not his intention to have his mortgage extinguished, his interest does not merge, but the mortgage will be treated as a security for the amount advanced.

Mr. L. Greiner, for complainants.

Mr. A. G. Sayre, for defendant Boppe.

THE VICE-CHANCELLOR.

This cause was submitted without argument, upon the pleadings and proofs. The complainants are the holders of two mortgages which their bill is filed to foreclose; one for

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1, dated January 17th, 1866; the other for \$4000, September 19th, of the same year. The defendant is the holder of an intermediate mortgage, dated September 19th, 1866, for \$2000, made to him by Frederick Slater and wife, owners of the fee. The validity of Slater's mortgage is the controverted point in the suit, and is denied by the complainants, mainly on the ground that the fee became merged in and extinguished by a conveyance of the mortgaged premises, executed to Boppe by Hausedorf and wife, in the month of July, 1868.

Generally, the law is, that when the mortgagee purchases the equity of redemption of the mortgagor, his mortgage is extinguished; it is said to be merged. But this legal doctrine is subject to qualifications. Merger is not required in equity, and is never allowed, unless for special reasons, and to promote the intention of the party. 4 *Kent's* 102.

Forbes v. Moffatt, 18 Vesey 390, a mortgage was held not merged by union with the fee. It was said by Sir William Grant, that a person becoming entitled to an estate subject to a mortgage for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. The question is the intention, actual or presumed, of the person in whom the interests are united. Where it is of no sort of use to a person to have the charge on his own estate kept up, there it will be held to sink, unless something shall have been done to keep it on foot. Upon looking into all the cases, especially where charges have been held to merge, he finds nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist; and, in that case, it sinks.

Starr v. Ellis, 6 Johns. Ch. 393, Chancellor Kent states the rule to be, that the union of the two estates will operate as a merger, unless there be some beneficial purpose or declared intent to prevent it. A court of equity will not leave an encumbrance alive, or consider it extinguished, as

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will best serve the purposes of justice and the actual intention of the party. It must, at all events, be an innocent purpose, and injurious to no one.

In the present case, the purpose of the conveyance to Mrs. Hauesler is the principal matter to which evidence is given. It is testified to by the grantors, Hauesler and wife, on the one hand, and by Boppe on the other. The deed is dated the 8th of July, 1868, and was acknowledged on the 15th of July, 1868. Boppe testifies that before that time he had left the country, and was on his way to Europe; that, before he left, he had become indebted for large sums, as Hauesler's endorser; that Hauesler had promised to secure him, but did not do so before he left; that no specific security had then been arranged for him; that while he was absent, the conveyance to him was executed and put upon record, and that he knew nothing of it until his return in the following November. He says that he did not purchase the property, and paid nothing towards the consideration in the deed; that while he was absent, and a few weeks before the date of the deed, Hauesler went into bankruptcy; that on his own return, he set up no claim under the deed, which went for nothing, and that he presented, with his creditors, his demands for endorsements paid, and for mortgaged premises to be sold by the assignee.

Hauesler and wife contradict this, and testify that Boppe was present at the execution of the deed; that it was executed to him in person; that its object was to keep the property out of the hands of Hauesler's creditors, and that Boppe, at that time, executed a deed for the property to Mrs. Hauesler. But this deed they do not produce. They say it was recorded, and that it was destroyed. He denies that it ever existed. Their account of the particulars and circumstances attending the execution and delivery of the deed shows that they think that they may have forgotten the facts as they actually occurred. The persons who were alleged to have been present are not produced. One of them—Mr. Meeker, with whom their acknowledgment—is in Europe; the others, they say, they did not know. They do not pretend that the p

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was purchased by Boppe, or that it was his intention to have his mortgage extinguished, or affected by the deed. On the contrary, they admit that such was not the intent. They do not pretend that Boppe derived, or expected to derive, any benefit from the conveyance, though, if made with his knowledge, and by his instructions, it would seem probable his purpose was to protect himself against liabilities which are sufficiently shown to have been outstanding against him as Hauesler's endorser. In respect to the conveyance, their testimony is directed to the point that Boppe acted with them in transferring the title from Hauesler to his wife, in fraud of the creditors. In considering their testimony, I cannot regard it as sufficient to establish this charge, and shall therefore not consider its effect if established. Their testimony is noticeably uncertain and weak. Statements are made and recalled, or admitted to be doubtful and conjectural. Their memories are manifestly confused and unreliable. This appears in what they say of the consideration of the mortgage to Boppe for \$2000. In denying that this sum was advanced by him, they are contradicted by the documentary proofs, and are clearly shown to be wrong. I am satisfied that the whole principal was advanced by him, and no part of it or of the interest appears to have been paid.

There are no equities to be subserved by holding the mortgage to have been extinguished. All the equities are against it. The complainants have been in no wise injured by the conveyance, whatever its object was; nor can any injustice be done them by allowing the defendant to recover the amount due on it for principal and interest.

I must advise such a decree.

Pinner v. Sharp.

PINNER vs. SHARP and wife.

1. In view of the extraordinary circumstances under which the contract sought to be enforced was made, and its purely unilateral character, the court, in the exercise of its discretion, left the complainant to his action at law.

2. No decree can be made against a wife to execute a deed.

The cause was argued on the pleadings and proofs.

Mr. A. Kirkpatrick, for complainant.

Mr. A. A. Clark and *Mr. H. M. Gaston*, for defendants.

THE VICE-CHANCELLOR.

The complainant, Moritz Pinner, seeks, by this suit, the specific performance of an agreement made by the defendants, Jacob F. Sharp and wife, for the conveyance to Pinner of their farm of one hundred and thirty acres, in the county of Somerset, situated on the southerly side of the Central railroad, at Finderne, two miles east of Somerville. The agreement is in writing, dated and executed on the 2d of July, 1870. The defendants admit that they signed it, but deny that they read it, or were made aware of its contents. Their defence is that they were led to sign it upon a misrepresentation of its terms and effect.

Fifty acres of the farm are high lands, suitable for building, and adjoin the road on the north. The remaining eighty are meadow lands, lying south of the highlands, and are about equally divided by the Raritan river running through them from west to east. The buildings on the upper portion next to the road are a large dwelling-house, barn, and other outbuildings suitable for farming purposes. The farm was occupied by the tenants of the defendants, their own residence being near, on the opposite side of the road.

The complainant, a resident of Perth Amboy, doing business

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s in New York, and a dealer in real estate, had learned m Garret Van Doren, a real estate agent at Somerville, t the farm was for sale, that the price was \$26,000, and t Sharp was willing to give the refusal of it for three nths, at that price, for the sum of \$100. On the 2d of y he went out to Finderne, according to appointment, and : the defendants for the first time. Sharp was absent on arrival, but returning towards noon, met Pinner while mining the land. They looked at it together, and then it to Sharp's house, where, after dinner, Pinner drew up agreement in the hall. When the defendants had signed Sharp's son, a lad of seventeen, and also a domestic, were ed in at Pinner's request and signed it as witnesses. Pinner said he was in haste and desirous to return to New York h the train. It does not certainly appear how long he d at the house. He says from one to three hours. He s the writing and rode back to Somerville with Sharp.

The agreement is of considerable length, covering four es of a large letter sheet, with no erasures, and three slight rlineations noted above the witnesses' names. Its proportions are particular and exact, evincing, in the clear expression and orderly arrangement of them, the skill of an experienced draftsman. It is entirely unilateral, and gives a the refusal of the farm for six months instead of three, the price of \$20,000 instead of \$26,000, and for the payment down of \$50 instead of \$100. Sharp admits that his ns, as originally communicated to Pinner, were altered as he length of time the refusal was to last and the sum to paid down, but in nothing else.

The agreement goes on to provide that \$1450 shall be paid the end of six months, if a deed shall then be required; t the balance of the price, \$18,500, shall be secured by mortgage on the premises, payable in five years, with interest seven per cent., payable yearly; that if, upon survey, farm should be found to be more than one hundred and rty acres, nothing should be added to the price, but if less n one hundred and twenty-eight acres, a proportionate re-

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duction should be made; that the title should be free of encumbrances; that possession should be given at the end of the period limited for the deed; that the mortgage should contain the conditions that Pinner and his legal representatives should have the right to construct, on and through the farm and homestead, roads, streets, drives, and avenues, to occupy in all no more than fifteen acres; and such roads, streets, drives, and avenues were then to be forever released and freed from the action and consequences of the mortgage, or any unpaid part of it; that Pinner and his legal representatives should have the right to release portions of the farm and homestead from time to time, at option, by paying to Sharp and wife, or the parties then holding the mortgage, an amount equal to \$200 per acre for every acre, lot, or portion of land so released or to be released; such payments to be credited on the mortgage; that Pinner and his legal representatives should have the right to deposit with the clerk of the county of Somerset all the money tendered, or to be tendered, at any time in payment of any portion of the farm or homestead so to be released, should Sharp and wife, or their legal representatives, be inaccessible or refuse to receive such money, or to release such portions as above, and that the receipt of the clerk of said county for such money, and the designation in said receipt or receipts of said portions thus to be released, should act as a complete release of such portions of land from the action and consequences of said mortgage or any unpaid part thereof; that Pinner and his legal representatives, at his or their option, should have the right to dispose of the farm and homestead in parts and fractions, taking in payment for such parts and fractions, mortgages on such parts and fractions; and such mortgages on such parts and fractions should be accepted by Sharp and wife, or their legal representatives, or the holder of said mortgage, as payments of and towards the amount of the same; provided always, that the mortgages thus to be tendered in part payment should not encumber the parts or fractions of land from which the same should have been given, to an extent exceeding

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per acre; that up to the time that \$3500 should be paid on account of said mortgage, the buildings on the farm should be and remain insured for \$4000, and the farm to be given as collateral with the mortgage.

The accounts given by Sharp and wife and their son, in the preparation and execution of this agreement, are in irreconcilable conflict with that given by Pinner. Pinner says that when he met Pinner on the farm on July, he told him he had come to get the refusal of his brother-in-law, in Prussia or France, provided he would sell; that Pinner said Van Doren had told him he would sell for \$26,000 for the farm; that Pinner expressed no objection to that; that not a word was said, while they were around the farm, about purchasing; that nothing was said before or during dinner, about the contract or terms of the agreement. Pinner says that where they met, the drift of the conversation was to get the refusal for a certain length of time; that the conversation with reference to the price took place in the house, and, he thinks, also in the road; that no objection was made through the whole conversation, excepting at intervals, Mrs. Sharp; that the paper was written in that he was desirous of returning to New York in the afternoon, and having no great time to spare, began to write the contract, and, to save re-writing, talked over with Sharp each particular point, term, and condition, until it was put down in writing; that the agreement was read to him and his wife before signing; that each clause was read to Sharp immediately after it was written, to get an understanding between them whether or not it expressed the ideas they intended it to convey; and that after it had been written, ready for signature, Mr. Sharp sat down by him and Mrs. Sharp close by, looking into the paper while he was reading it.

Sharp and wife swear that not a word of it was read to Pinner. Pinner says she wished it read, but Pinner answered by saying it was not binding. She says that after dinner her husband came in where she was, for paper, and said Pinner

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wanted to write a piece of writing for the refusal of the place for six months, if she were willing, and she said she was; Pinner was in the hall, but the door was open; she says: "My attention was not called to it afterwards till I was asked to sign the paper; I was in the dining-room, next to the hall, when Mr. Sharp called me; I went in the hall; I told Mr. Pinner I thought there was a great deal of writing for the refusal of the farm, and I refused to sign the writing till I had seen either Lawyer Clark or Gaston; he said I need not be afraid to sign it, there was nothing binding; it was only to show that it was for the refusal of the farm for six months, if he could get his brother-in-law to come—if not, he did not want it; he did not want it for himself; he said it took six months to get word from his brother-in-law, and if the letter came at the close of six months he would come and bargain for the place; if not, there would be no more of it; then I signed the paper and went out; I signed the paper because Mr. Pinner said the paper was not binding; no part was read to me, not a word of it, before I signed it."

Her son, Philemon Sharp, being called by the complainant as attesting witness to the agreement, on his cross-examination swore—"I was sent for to sign my name; Mr. Pinner said he wanted me to sign my name to articles of agreement for the refusal of the farm for six months; my mother, in my presence, said she would rather go to Somerville, and have some lawyer see the writing; Mr. Pinner replied, it is nothing binding, it is only the refusal of the farm for six months; my mother spoke about going to Somerville to consult a lawyer, as I think, before I signed my name, but it was after she had signed, I am sure; Mr. Pinner's exact words were, 'It is nothing binding, only the refusal of the farm for six months;' my mother didn't seem satisfied with this; I don't remember whether she said anything further; I know my mother was not satisfied, because she spoke about it that night, afterwards; she said she would rather have gone to Somerville, to consult some lawyer."

Sharp swears—"After dinner, he said he would like to

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ve the refusal, in case he could get his brother-in-law to me; he said this in the hall; we were then alone; he nted the refusal for six months, for \$50; he said nothing to the price for which he wanted the refusal; nothing s said by either, at that time, as to terms or conditions; hing about a mortgage; we did not bargain for the farm; id not tell him in what way I wanted the \$26,000 paid; were conversing five minutes before he began to write; o not think he spoke to me while writing, further than to it took a very clear head to write such a writing; after writing was done, he read a little part of it, and wanted to sign; I do not remember how much he read to me— o not think as much as two pages; I did not notice at time that he did not read the whole of it; he read a little, l said the rest was not binding; I could not say positive t he did not read the whole of it; I paid no attention to I am sure he told me it was a refusal for the farm before igned it; Mrs. Sharp was not present during the writing; igned the paper as a refusal of the farm for \$50."

The foregoing statements exhibit briefly the substance of ir contradictory stories. Their testimony is extensive and uite. It is unnecessary to review it in detail.

The paper was left by Pinner at the clerk's office. Sharp s he first learned the conditions of it from Mr. Van Doren, August following, or the last of July, who then told him ere it was, and what it contained. The complainant has red evidence to contradict this, and to show that Sharp l after Pinner had left, on the day the contract was signed, t he had given the refusal for the price of \$20,000. The l estate agent, Van Doren, testifies that he saw Sharp at depot that afternoon with Pinner, and that he thinks he l him that he had sold the refusal for \$50, and for that ce, but he does not speak positively; and I am satisfied, m the other evidence in the cause, and from his mis-recollection of other particulars to which he speaks, that he did t see him then, and that Sharp's story, that he first learned

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the details of the paper from the copy of it obtained from the clerk, may be true.

Several witnesses have testified to the value of the farm when this contract was made. It appears satisfactorily, think, that it was worth \$26,000, the sum originally asked. Witnesses were also sworn to impeach Pinner's character, but without success. Their testimony on that point, is illegal in kind, and weak in degree. He describes himself as a Prussian by birth, and as a resident of this country since 1855 engaged in the business of selling patents. Being unmarried he did not want the farm for himself. His testimony is clear, positive, and consistent with itself, comparing, in these respects, by no means unfavorably with Sharp's. In examining the evidence of both, as taken before the master, and without knowledge or observation of either, I am unable to say with confidence, where or what the truth is. It is difficult to see how a man of mature years and average sense, as Sharp must be presumed to be, could receive money and execute a paper for the refusal of his farm for six months, relying upon the assurance of the stranger who wrote it, that it would not be binding. It is little less to be wondered at that he signed all, a document drawn by a stranger with interests adverse to his own, without reading it *himself*; without submitting it to an adviser, and without keeping a copy. That he did so, however, is certain. The latter facts may serve, perhaps, to make it more credible that he signed it upon a general assurance and belief of its purport, and without attending to a possibly hasty, imperfect, or unintelligible reading. But this is not to be accepted without plenary proof. Sealed instruments, executed voluntarily, by competent parties, are not to be lightly impeached. To set aside the contract made in this case, the fraud or deception set up must be clearly and conclusively proved. The presumptions are against it. ¶ This, however, is not a suit by the defendants to have the contract annulled, but an application to the extraordinary jurisdiction of equity to enforce it. ¶ A contract, though valid in law, is not sufficient for the recovery of damages, may not be such.

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equity will decree to be performed. It rests by the familiar rules in the sound discretion of the court, to enforce it, or leave the parties to their remedies at law. This discretion is not the exercise of an arbitrary will, but of judgment guided by principles and reasons.

In the present case no special equities are presented by the complainant. The original suggestion that his relatives in Europe were coming to occupy the farm, is substantially withdrawn. It is apparent from the contract itself, that the complainant had ulterior ends. He wants it only to sell again, and because its value is greater than the price he is to pay. The injury, if any, is entirely pecuniary, and can be covered by damages at law. The contract is unilateral, and not mutual. It binds the defendants to convey, but not him to take. Optional contracts are not favored in equity, though if founded on consideration, and free from objections in other respects, are enforced. The provisions of this contract are unusual, and favorable to the complainant and unfavorable to the defendants, both as to conditions and price; and this disparity is apparent on its face. The price is less than could easily have been obtained at a prompt sale and on ordinary terms; and while I cannot regard the price as inadequate or the bargain as unconscionable in the sense of the law, they are not without influence in connection with the other facts of the case. The circumstances attending its preparation and execution, as related by the complainant himself, are well calculated to engender distrust. It is difficult to see how, in the space of that single and limited interview, this bargain, widely different from that originally proposed, and with peculiar details, could have been deliberately and intelligently made. As to the defendant, Mrs. Sharp, it is admitted it was not. Whatever discussion and consideration were had, were necessarily hasty and brief. Sharp, himself, was evidently far less than the equal of the complainant, by whom the contract was drawn, if it be true that its provisions were then and there conceived and arranged. While the defendant may perhaps be liable at law for his rash and ill-advised acts, and

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bound by his bargain however indiscreet, I cannot regard the complainant, upon his own statement of the extraordinary circumstances of the case, and the hurried nature of the transaction, excluding the customary deliberation and advisement that would have placed his bargain beyond suspicion and impeachment, and such as a prudent and fair-minded man would have allowed, as entitled to the aid of this court in securing the fruits of his remarkable persuasiveness and skill. The positive evidence of the defendants goes to confirm this conclusion. Another reason for leaving the complainant to his action at law is, that his bill seeks a decree against Sharp and his wife. The land was not hers. In *Young v. Paul*, 2 Stockt. 404, which was a suit for specific performance, Chancellor Williamson says: "It is objected that the wife is not a party to the bill, and that no decree can be made against her to execute the deed. No decree could be made against her if she were a party. If she had actually signed the agreement with her husband, it would have been absolutely void as to her, and no suit at law or equity could be maintained against her upon such an agreement. A *feme covert* cannot make a contract, either with or without the consent of her husband except as to her separate estate. Our late statutes respecting the rights of married women do not affect this principle of the common law."

In *Hawratty v. Warren*, 3 C. E. Green 124, where the complainant in his bill for a conveyance asked a title requiring the execution of the conveyance by the wife, and it appeared that the wife was unwilling to convey, Chancellor Zabriskie says: "The court will not order a defendant to procure a conveyance or release by his wife, or require him to furnish an indemnity against her right of dower, unless in cases of fraud, where her refusal is shown to be by procurement on his part; and that, in case of a mere optional contract, it is much better to leave the party to his remedy at law."

I shall advise, in this case, that the bill be dismissed.

CASES

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1873.

RUCKMAN vs. DECKER and others.

1. An agreement by R. to join with W. in the business of planting and selling oysters, by which R. was to find the capital and W. to go to Virginia and plant and buy oysters, to be sent to R. in his vessels to New York for sale, each to have one-half of the net profits, is a partnership.
 2. On the termination of such partnership, planted oysters remaining in the beds after payment of all partnership debts, are the common property of both partners, of which, as in case of any personal property held in common, one tenant in common cannot dispose of the share of the other without his authority.
 3. If such tenant in common turn over such property to a firm of which he becomes a member, such firm is accountable to the other tenant in common of the property, for the value of his share of the property so turned over and used by the new firm.
 4. The purchase of the property of one man from another who is in possession of it, without authority from the true owner to sell it, will not change the title, nor protect such purchaser against the true owner. The doctrine of equity, which protects a *bona fide* purchaser without notice, only applies to a purchaser of the legal title, without notice of the equitable title of a third person. And in such case notice to one partner would be held as notice to the firm.
 5. In equity, the defence of the statute of limitations may be set up by plea, answer, or demurrer; but if not set up in any way in the pleadings it cannot avail.
 6. The admissions of one partner are evidence against the others, in a suit brought against all for partnership liabilities.
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Ruckman v. Decker.

Argued on final hearing, upon pleadings and proofs.

Mr. J. B. Vredenburg and *Mr. J. Weart*, for complainant -

Mr. B. Gummere, for defendants.

THE CHANCELLOR.

The complainant brings his suit against Benjamin Decker and William Decker, and Basil W. Wilson, for an account. The two Deckers have answered; Wilson has not. Wilson died, pending the suit, in October, 1870, and the suit is continued against the Deckers, as survivors. The complainant, for some years prior to April, 1857, was engaged in the business of importing and selling oysters in the city of New York; a business conducted on scows moored to the wharves, in which oysters are received, and from which they are sold. The oysters are obtained by sending vessels to the south—principally to Virginia—where the oysters are sometimes taken from beds in which they have been planted for the oyster-dealer, and sometimes are purchased from vessels which come alongside, offering them for sale. Sometimes the oysters so purchased are dumped or thrown overboard upon a reef or bar, overflowed by tide-water, so as to be preserved until a full cargo is gathered for a vessel to New York. The complainant relinquished the business of an oyster-dealer in April, 1857, and since then has resided at Closter, in the county of Bergen. The defendants, B. and W. Decker, are, and have been for more than twenty years, oyster-dealers in the city of New York, their place of business there being in the vicinity of that formerly occupied by the complainant.

The complainant, in 1851, entered into an agreement with Wilson, that Wilson should go to Virginia and purchase oysters to be shipped for New York, and plant oysters on oyster-beds in the waters of Virginia, and send them, when in fit state, to the complainant in New York. The complainant was to furnish all the money needed for the business, and to sell the oysters, and Wilson to give his time and attention

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it ; the profits, after payment of all advances and expenses, were to be equally divided between the complainant and Wilson. Wilson, in pursuance of this agreement, went to Virginia, and rented of Henry Phillips a tract of land fit for planting oysters, in the Nansemond river, in front of Phillips' farm, situate on the west side of the river, in Nansemond county. In January, 1853, Wilson purchased of Phillips his farm, containing one hundred and seventy acres, for 2500, the money being furnished by the complainant, and he deed taken in the name of Wilson, on the supposition that, as Ruckman was a non-resident, he would not be allowed to carry on the business there, because the laws of Virginia prohibit the taking of oysters by non-residents. Afterwards, in 1856, Wilson gave the complainant a writing, by which he acknowledged the right of complainant to one-half of this farm thus bought with his money ; and in 1869 a conveyance of that half was obtained by the complainant through a decree of this court. In front of this farm, on the Nansemond river, was a tract of flats of about eighty acres, fit for planting oysters. There does not appear to be any law in Virginia giving to the riparian owner any exclusive right to plant oysters in the flats under tide-waters in front of his lands below low-water mark. But the custom seems to be to concede this to him, and by the law of the state, any one who stakes out and plants an oyster-bed, is protected in his property.

Wilson, under the agreement with the complainant, and with funds furnished by him from and before 1853, and until and in 1857, planted oysters on these flats, and from time to time shipped oysters from them to the complainant in New York.

In 1856, Wilson told B. and W. Decker that he was dissatisfied with the conduct of the complainant, and would terminate his connection with him, and offered to undertake planting and purchasing oysters for them in Virginia, on the same terms as he had done with the complainant. The Deckers made an arrangement with him on the same terms as that between him and the complainant. In May, 1856, the

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Deckers began to advance money to Wilson under this arrangement, and furnished him large sums of money, exceeding \$50,000, until the arrangement was discontinued in 1867. Wilson planted oysters under this arrangement at Ferry Point, in the Nansemond river, or a place about five miles above the Phillips farm; and after 1858, planted some on the flats in front of the Phillips farm, which I shall call the Wilson bed. Wilson sent oysters to the Deckers from Virginia from 1856 to 1867, with some intermission during the four years of the war. During the whole time many of the oysters were loaded on the vessels from the Wilson bed. After April, 1857, Wilson did not send any oysters to the complainant, but in 1858 sent to B. and W. Decker four cargoes of oysters, as the property of Ruckman and Wilson, to be sold on their account. This consignment was known to the complainant, who sanctioned it by receiving part of the proceeds of the sales from B. and W. Decker. The amount of these sales has never been fully paid over. B. and W. Decker acknowledge that they owe a balance of about \$75,000 while the complainant claims a much larger sum.

The complainant charges and claims that when Wilson ceased sending oysters to him, there was, on the Wilson bed in front of the Phillips farm, a large amount of oysters of the value of \$40,000 and upwards; and that these, after the termination of the partnership, or the business of sending them to New York to sell, belonged to him and Wilson, as tenants in common; that they were the proceeds of the partnership business and represented the profits, and were to be equally divided; that Wilson sent these oysters to B. and W. Decker, under his arrangement with them, and by them they were received and sold for the benefit of the partnership existing between Wilson and them; and he asks that they shall account to him for his share of these oysters thus appropriated. He claims that he and Wilson owned the flats in front of the Phillips farm, and that the firm of Wilson and Decker shall account to him for the value of his half of these

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flats, used by them for the planting of oysters since those planted for him were taken off.

The Deckers, in their answer, say that neither of them was ever down at the Nansemond river, and state, from information and belief, that the oysters sent to them by Wilson were not the oysters planted there by Wilson for the complainant, and that none were sent from the flats in front of the Phillips farm, except oysters planted there by Wilson for them after the oysters of Ruckman and Wilson had been cleaned up, and oysters temporarily dumped there for them. They deny that any oysters planted there for them by Wilson caused any injury to the complainant. They admit that in 1858, the four cargoes of oysters mentioned above were consigned by Wilson to them for sale, and insist that they have accounted fully for them to both Ruckman and Wilson, except a small balance.

Before I proceed to consider the evidence, I will dispose of some preliminary questions of law.

In the first place, it is clear that the arrangement made between Ruckman and Wilson, and that between the Deckers and Wilson, created a partnership in each case. It provided for the carrying on of the business by one party contributing capital, and the other skill and labor; and that each should have an equal share of the profits and bear an equal share of loss. This constitutes a partnership.

In the second place, the defendants contend that they cannot be called upon to account in this court; that if they have taken and appropriated the complainant's property, or occupied his land, his remedy is at law, by action of trespass or trover, or for money had and received for the oysters sold, and by action for the use and occupation of the oyster bed.

But the charge is that Wilson, while a partner with complainant, or after the termination of the partnership, while in possession of the effects of the late partnership belonging to both as tenants in common, in the absence and without the knowledge of the complainant, secretly and fraudulently turned over this property to another firm, of which he was a

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member, without either rendering or keeping an account of the quantity and value so turned over. One tenant in common can maintain a suit in equity against his co-tenant, and although the rule is more generally applied to tenants in common of real estate, it is not confined to them. And in a case where the charge is that the property was fraudulently and secretly converted by the tenant in common, and a discovery is necessary for ascertaining the amount and extent of the wrong, a suit in equity will be maintained. No other remedy is adequate. And where the tenant in common, as in this case, has turned over the property to a firm of which he is a member, and the firm has received the benefit of the property, the suit can be maintained against them all. They having used and appropriated the complainant's property without his consent and without payment, are bound to make compensation. Wilson had no power to sell the complainant's half of these oysters. *Story on Part.*, §§ 333, 346; *Buckley v. Barber*, 1 *Eng. L. & Eq. R.* 511; *Fox v. Hanbury, Cowp.* 445, 449; *Hague v. Rolleston*, 4 *Burr.* 2174; *Phillips v. Reeder*, 3 *C. E. Green* 99. And even if they had paid him in full, the true owner, as in all other unauthorized sales of personal property, can recover of the firm the property or its value.

In the third place, the Deckers contend that as they did not know that the oysters sent to them by Wilson were in whole or in part the complainant's property, or planted on land belonging to him, and as they have paid Wilson for them in good faith on their settlement with him, they should not be held liable to the complainant. If we concede that the Deckers, by their answer and evidence, have established that they acted in entire good faith, and had no knowledge or suspicion that any of the oysters sent them by Wilson belonged to Ruckman, that is no defence in this action. The legal owner of any chattels cannot be deprived of his property by a sale not authorized by him, although the purchaser acted in entire good faith, and the vendor was in possession of the property seemingly as if his own. An agistor of cattle, or a

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every-stable keeper, cannot give good title to cattle or horses taken with him; nor would a sale by a jeweller of a diamond necklace left by a customer for repair, pass the title, though the purchaser bought and paid for it in good faith, while exhibited in the show-case with the jewelry of the vendor. The peculiar doctrine of equity as to a *bona fide* purchaser without notice, is only applied in cases where it protects the legal title as against an equity of which the purchaser of the legal title had no notice. Again, the three defendants in this case are partners, and are sued as such; they were partners at the time of the alleged taking of these oysters. The doctrine of partnership applies to them, and by that doctrine notice to one partner is notice to all; and if Wilson knew at that time that these oysters were in part the complainant's, his knowledge was that of the firm. He may have defrauded his partners; it is probable that he did. Yet the severe but necessary law of partnership makes them liable for his acts and knowledge.

In the fifth place, it is contended that the complainant's remedy is barred by time; that courts of equity adopt the limitations prescribed for the courts of law, and besides this discourage laches, by refusing to entertain suits where the delay has been unreasonable. The limitation for actions of account is six years, and all the claims for matters before 1863 will be shut out, if the statute could be taken advantage of in this suit; but the statute has not been pleaded or set up in the answer as a defence. In suits at law this defence must be pleaded. In equity it may be taken advantage of by plea. *Story's Eq. Pl.*, §§ 751, 759. Or where the facts appear in the bill, by demurrer. *Story's Eq. Pl.*, § 503. Or it may be set up in the answer. *Story's Eq. Pl.*, §§ 503, 751, 847; *Watt v. Vattier*, 9 *Pet.* 405; *Van Hook v. Whitlock*, 7 *Paige* 3; *Boone v. Chiles*, 10 *Pet.* 177.

But there is no authority holding that it can be taken advantage of without being somewhere set up as a defence. The reasoning in all the cases implies that it must be expressly set up. It would be unfair to allow it, unless set up

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in the pleading. In many cases the complainant could have replied when special replications were allowed any of the exceptions to the plea, and could now set them up by the substituted practice of amending his bill for the purpose. And he could then produce proof of the exception. The evidence in this case does not support the defence. The defendant, Wilson, lived in Virginia until 1866. The two Deckers did business in New York, and must be presumed to have resided there until 1867, when it first appears that both resided in New Jersey. There may be a presumption of law that a residence once obtained continues until a change is shown. But there is no presumption that a person shown to have resided in Hoboken in 1867, resided there for six years before. Outside of the statute of limitations there is no laches not explained by the circumstances of the case.

The consignment made by Wilson to the Deckers of four cargoes of oysters in 1858, cannot come in question here. It was assented to by Ruckman, and it was thus, in fact, a sale by Ruckman and Wilson of their own oysters to B. and W. Decker. The claim is by Ruckman and Wilson against B. and W. Decker, and cannot be brought forward in a suit in which Wilson, who is entitled to half of it, is a defendant.

The admissions of Wilson, made while he was a partner with the Deckers, are admissible here, both because the admissions of one partner are evidence against the firm, and because he is a defendant in the suit for matters done by him jointly with the other defendants, who are shown to have been acting with him by receiving and selling the oysters.

I will not consider the testimony given by a large number of witnesses on both sides, as to the character of Ruckman for truth and veracity. The conclusions at which I have arrived are based almost wholly on other testimony. The chief importance of his testimony was in showing the knowledge of his interest by the Deckers, which, in the view I have taken, is of no consequence; and the other evidence given by him of admissions and conversations—evidence never to be much re-

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ed on—is of little weight, when resting upon the sole testimony of a party in the cause.

The main question is as to the weight and effect of the evidence. The complainant has the burden of proof; he is bound to show that the oysters sent by Wilson to the Deckers were the oysters planted by Wilson for him, or oysters planted on the Wilson bed, while any of his oysters of appreciable value remained there. The law of Virginia protects the owners of oysters planted on such beds in their property; (*Code of 1849, p. 453, § 23*;) and while it prohibits non-residents from taking oysters in the waters of the state, it declares that, for the purpose of that enactment, the owner of lands or adjoining any tide-water course, shall not be considered non-resident. (*Code of 1849, p. 730, § 23*. The complainant was within the protection of that law; and therefore, when any one put his oysters on the bed of the complainant, they could not be distinguished, they became his by the doctrine of confusion of goods.

The evidence, in my opinion, establishes the fact that Wilson planted no oysters on this bed for Ruckman after 1857, and that some were planted in that year. Wilson's letter of the 24th, 1857, and his receipts of June 10th, and July 7th of that year, are sufficient as against him to sustain that conclusion. Wilson planted few or none on this bed for the Deckers, prior to 1859. He began planting for them in 1856, and planted largely for them at Ferry Point, about five miles above this bed, in the same river.

There is evidence on part of the defendants, that this bed was cleaned up in 1857 and 1858, by Wilson, and the oysters were taken up on a reef or bar in it, from which they were taken New York, being the four cargoes taken there in 1858.

The bed was large, about eighty acres, all under water at ordinary low tide. It was staked off in parcels by four hundred stakes, which may have marked off over one hundred beds, and the witnesses may have cleaned off the beds on which they worked, while others were untouched. It is otherwise impossible to reconcile their testimony with that of a

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large number of witnesses who say that in 1858, 1859, and 1860, they took from these flats cargoes of oysters, of which many were old oysters, over one and two years old. If none were planted there for the Deckers until 1859, these oysters must have been those planted for Ruckman; and although oysters of one year old taken in 1860, may have been those planted in 1859, yet where these were mixed with oysters of two years old, as in most cases they were, they must have been from the Ruckman beds, on which oysters were planted in 1859 for the Deckers, and which became Ruckman's by confusion of mixture. Wilson's letter to Ruckman, of December, 1858, shows that there were oysters of Ruckman and Wilson then on this bed that needed care, and which he proposed to dispose of in the spring of 1859. This fact is inconsistent with the entire cleaning up in 1858.

The great weight of the testimony of practical oystermen shows that after oysters have been planted for four or five years on ground like most of this bed, they perish or disappear. And as no oysters were planted on this bed for Ruckman after 1857, and comparatively few in that year, I will assume that all the oysters in which he had any interest disappeared after 1860, and shall confine myself to the consideration of the evidence up to and including that year only, to ascertain what oysters were taken that must be accounted for to Ruckman.

The witnesses who testify to taking oysters for the defendants from these grounds in 1858, 1859, and 1860, do not expressly say that the oysters taken by them were planted oysters, and not oysters dumped or gathered there for sale. But these witnesses are old oystermen; they show that they knew of the claim that the oysters planted on these beds in front of the Phillips house were planted for Ruckman, and that those planted on Ferry Point were for the Deckers; and when speaking of and distinguishing the cargoes taken from each of these places, they could not have failed to point out that the oysters were taken from heaps deposited for loading vessels, and not from the beds in which they were planted. It

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must be assumed, from the whole of their testimony, that they took the oysters from beds in which they were planted. If it had been from heaps dumped for loading vessels, it should have been shown by the defendants.

It is my duty to decide the merits of the cause upon the evidence. That cannot be referred to a master, but only to ascertain quantities and prices, and from them to compute values. The Chancellor must decide whether it is established by proof that any oysters of Ruckman were taken, and by whom, or what vessel, and then refer it to a master to compute the values of such cargoes as he is satisfied were taken.

I shall assume that all oysters taken from the Wilson beds in 1858, all of one year old taken in 1859, and all of two years old, or mixed with those of two years old, taken in 1860, belonged to Ruckman and Wilson.

Captain Skidmore W. Pettit, with his schooner "Caroline Jones," in the winter of 1858-9, brought five cargoes for the Deckers from Virginia. One-half of these were loaded from the Wilson beds, planted for Ruckman; and these were old oysters, planted from four to five years. His cargo was two thousand bushels. Captain Peter W. Roff, with his vessel, the "Butler," in the winter of 1857-8, brought five or six cargoes from Virginia. Part of most of these cargoes were taken from this bed, and the whole of some of them. These oysters had been planted a year and upwards. The evidence as to the quantity from this bed, is not very definite, but it must be inferred from it that a quantity equal to one-half of five cargoes of two thousand bushels each was taken. The next season he was pilot on the "Aiken," and she brought from this bed five cargoes of four thousand bushels each. The third season, or 1859-60, he brought, in the "Julia Decker" and "Aiken," from this bed, three cargoes of four thousand bushels each. Roff testifies to a great number of cargoes taken from this bed, but part of them were in 1861. Captain Joline, of the "Butler," which he then commanded, in the winter of 1859, brought for the Deckers a cargo of sixteen hundred bushels, of which one-half were

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taken by Wilson from this bed—old oysters, from two to four years old.

Even with the rule that the burden of proof is on the complainant, the evidence sustains me in declaring that the defendants must be charged with the eight full cargoes, and the eleven half cargoes which are above designated. The evidence compels me to believe that there were more that they should be charged with, but it is not sufficiently specific to enable me to point out and specify what cargoes or what part of them they should be charged with. The rule of equity may be, that when any one is left in possession of common property, as Wilson was in this case, and without right or authority disposes of it for his own benefit, and keeps no account, or renders none, the presumption should be against him, and he should be made to account for all that it appears probable that he had taken, and should be compelled to rebut the probable proof. But I am not willing to apply the rule to B. and W. Decker, the surviving defendants, and the responsible defendants in this case, who, I am satisfied, were not aware of any misconduct of Wilson towards the complainant, or that he was clandestinely shipping oysters of Ruckman to them as his own, or oysters bought with their money. The presumption is very strong that he was faithless both to Ruckman and the Deckers. I am willing to take the responsive answer of B. and W. Decker, denying such knowledge, as conclusive, and not overcome by the evidence of Ruckman. I do not consider the rule in this case as changed by the decision in *Bent v. Smith*, as, whatever may be the change established by that decision, Ruckman did not go through the formality of producing a written notice, or copy of a notice written by him, to constitute the other evidence required by the rule as claimed to be modified by that decision. But I do not think that the decision in that case was intended to change the rule so as to render two facts sworn to by one witness equivalent, in overcoming an answer, to two witnesses, or the evidence of more than one witness, as required by the rule formerly acted on. This want of knowledge, though no de-

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to the action, places them before the court in a position somewhat different from that of Wilson, or any other person who intentionally and fraudulently appropriates the property of another. The leaning of courts is always against the fraudulent wrong-doer.

The wrong done to the complainant was delivering his oysters, without his knowledge or consent, to the new firm of which Wilson was a member. Wilson, if the partnership with Ruckman continued, had no power to sell, but only to deliver them to New York to Ruckman for sale; if it was at an end as it was after 1857, he had no right to dispose of Ruckman's half in any way. The only recompense Ruckman is entitled to is the value of the oysters at the time they were so appropriated. By bringing this suit for account he waives his tort and is entitled to the same amount as if the oysters had been then sold by his authority. He has no right to draw them into the new firm and ask for an account of their profits out of them. An account must be taken of the value of these cargoes at the Wilson bed, delivered on vessels for export to New York, as these were delivered, and at the time when they were respectively delivered. The quantity of each cargo must be taken as before stated, unless it shall be shown to the master that the quantity in any cargo was different.

No allowance can be made for the use of these flats in front of the farm, for the reason that it does not appear that the complainant had any title to the flats, or that, by the law of Virginia, a riparian proprietor has an exclusive right to the flats in front of his land, except so far as he has oysters planted there, and then only so long as he maintains the beds. No allowance can be made for the boats and other implements used in the oyster business, furnished to Wilson by the complainant, because there is no proof that they ever came to the possession of the new firm or have been appropriated to it. If Wilson sold them and kept the proceeds, he alone, and not the new firm, is responsible.

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STEVENS' ADMINISTRATOR vs. STEVENS' EXECUTOR and others.

1. Where executors authorized to pay legacies given to testator's infant children by transfer of lands, convey part of the lands set aside for that purpose to one of their number—the mother of an infant child—in trust for the infant, these lands, upon the death of the infant, are to be considered as real estate and descend to her heirs-at-law, and do not go to her next of kin.

2. When legacies so authorized to be paid in land are directed to be held by the executors for the infant child until it attain a certain age, a conveyance to one of the executors in trust for the infant, according to the provisions of the will, will be held a proper setting aside of such lands and conveyance for the benefit of such child.

3. A direction that no child shall control the part given to him, or which shall come to him by inheritance from another child, includes personal property to which one child is entitled by succession from another. And such property is included in the direction that the executors shall take care of all money and property devised and bequeathed to any of them, until they arrive at a specified age. But the administrator of such deceased child is entitled to receive the shares of such next of kin as are not within that age, for distribution to them.

4. A direction to pay the income of each child to its mother for its support until it is entitled to its share, will not be held to direct such payment after the death of the child until the others arrive at the age specified for receiving their share. The direction being to pay for its support is terminated by its death.

This cause was argued on final hearing, upon the bill and the answers of Mary P. Lewis and of the infant children of Edwin A. Stevens.

Mr. Vanatta, for complainant.

Mr. F. B. Ogden, for Mrs. Lewis.

Mr. Besson, for infants.

THE CHANCELLOR.

This suit is by the administrator of Julia A. Stevens, deceased, one of the children of Edwin A. Stevens. It is brought against the executors of his will to ascertain and

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the part of the estate of their testator which the court may be entitled to under his will. The other surviving children of the testator, being his residuary legatees and next of kin of Julia, are made parties. They are all except his daughter, Mary P. Lewis, wife of Edward Lewis. She has answered with her husband, and the others have answered by their guardian ad litem, Martha B. Stevens, their mother. The executors have not answered, as executors, have no interest in the questions raised, the controversy being between Mrs. Lewis and the infants, Mrs. Stevens. The executors are properly parties to the suit and Mrs. Stevens is a party, though she has not answered individually or as executrix. In both capacities she is bound to submit to such decree as the court may make, without controversy on her behalf. Thus all necessary and proper parties are before the court.

Samuel A. Stevens died August 28th, 1868. He left a will, dated August 5th, 1865, with a codicil, dated April 15th, 1868, these were duly proved and probate issued to the court, Samuel B. Dod, and the defendants, Martha B. Stevens and William W. Shippen. He left eight children; three sons, Albert B. and Richard, born after the date of the will, and Richard born after the date of the codicil.

Martha, one of the daughters, died after the testator, on the 15th day of August, 1868. All the children, except Mrs. Lewis, were, at his death, and still are, under twenty-one. Mrs. Lewis was a child by a former wife, and half-sister of the testator.

The will gave to Mrs. Stevens and each of his children a legacy of \$100,000; the codicil gave a like legacy to Albert, and to any child that might thereafter be born. The will directed these legacies to be paid by productive property owned by him in his own name, and by the purchase of productive property, and bonds and mortgages, and other productive property of the Hoboken Land and Improvement Company.

The codicil empowered his executors to pay the legacies in the will and codicil by transferring personal pro-

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perty, stocks, bonds, and other securities in which his was invested, as well as any of his real estate standing in his own name, or such as his executors should receive from the Hoboken Land and Improvement Company; and in connection with the transfer of real estate, he gave power to his executors to pass the title, fee simple or otherwise, provided such property was real or personal, so transferred should be equal in value to the much of the legacy for which it should be transferred and conveyed to such legatees; all which payments in the execution thereof were therein authorized, to be in the discretion of the executors.

Besides the legacies of \$100,000 to his wife and each of his children, the codicil devised and bequeathed real estate and money legacies to others to a large amount. After the execution of the codicil declared, that the devise and bequest to him in his original will, of one-third of the profits of the business of his estate, in that devise and bequest mentioned, was intended, and it was his will, should be of the remainder of his estate, after making the demands upon it in that will provided for. In the next sentence he gave, devised and bequeathed the rest and residue of his estate, both real and personal, unto his wife and children born, and to be divided equally between each son to have two shares, and his wife two shares, and his daughter one share.

The personal estate of the testator was, in the inventory, valued at \$9,741,407.90, including fifteen thousand shares of the stock of the Hoboken Land and Improvement Company valued at \$8,996,677. His real estate at the same time was appraised and valued at \$1,181,500. This included Point and the homestead, devised to his four sons, and valued at \$350,000.

On the 9th of December, 1868, the executors did set apart out of the estate, real and personal, to the widow and each of the children of the testator, \$100,000 to each; and did set apart to his daughter Julia, three lots of land in Hoboken, valued at \$26,333, with sufficient personal property to make the value of \$100,000 bequeathed to her. These lands were, by the executors, conveyed to Martha B. Stevens in fee, in testimony of which the executors signed the following certificate.

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Julia, until she should arrive at the age of twenty-four years, and at that period to convey the same to her in accordance with the provisions of the will. And, at the same time, all the residue of the real estate of the testator, amounting in value to \$258,999, was conveyed to his wife and children in payment of the legacies of \$100,000. The personal estate set apart for the purpose was, at the same time, transferred for the payment of these legacies.

The executors, on the 16th of May, 1870, settled their account before the Orphans Court of the county of Hudson, and by this there remained in their hands on December 31st, 1869, a balance of \$6,915,661.93, all invested in fifteen thousand shares of the Hoboken Land and Improvement Company. This was above the \$800,000 paid over or held in trust by them for these certain legacies.

The first question raised is, whether these three lots so conveyed to Mrs. Stevens for Julia are to be considered as real estate. If they are, Mrs. Lewis and Mrs. Stevens are not entitled by succession to any share in them; if personal, they are entitled to share equally with the infant children.

The executors were clearly authorized by the will to pay the legacies of \$100,000, by conveying lands for the whole or any part. These were given as money legacies, and were due one year after testator's death. To Mrs. Stevens and Mrs. Lewis they could then be paid and delivered in full; they were then entitled to them. The direction that the others should not have the control or management of their shares until twenty-two or twenty-four years of age, and that until then the executors should take care of the money and property given to them, made the executors trustees for each infant child of the property given to it; but it was their duty to set off to each one its legacy at the end of the year, and take charge of it for each. This could be set apart in real or personal property, and when so designated and set apart each was entitled to any increase in value, and must suffer any loss in deterioration in his own share so separated. These lots the executors set apart by conveying them to Mrs. Stevens,

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one of their own number, in trust for Julia. She could not, or did not take the title as her guardian, for she had not given the bonds required before she can act as such; the title is to her in trust. The question before me is not upon the propriety of this transfer under the will, or whether it should not have been made to all three executors. It has been made, and by it Mrs. Stevens held these lots in trust for Julia at her death. That was a money legacy, and had by authority plainly given in the will, been converted into real estate. This conversion required no confirmation by Julia; the executors by the will had the power to convey it as part of the legacy. It so existed at Julia's death. Like the real estate of every *cestui que trust*, it descended to her heirs. The question, whether real or personal estate, depends upon what was the actual character of it at her death.

The second question is, whether the complainant is entitled to receive the personal property set off to Julia for her legacy of \$100,000, and her share of the residue, or the income of either. The direction that no child shall control the part given to him, or which shall come to him by inheritance from another, until twenty-two or twenty-four, is very explicit. The word inheritance is here used as designating anything that they might be entitled to by succession, and include personal property. The provision in the next paragraph: that the executor shall "take care of all money and property devised and bequeathed to any of them," does, literally construed, include this money coming by inheritance, because it is money bequeathed to Julia; and taken in connection with the provision against their having control of it, and there being no other way by which it could be kept from the control of the child, the literal construction that the legacy, "property bequeathed to one of them," must remain in the care of the executors until the next of kin are entitled to receive it, is necessary to give effect to the plainly expressed intention of the testator. But the complainant is entitled to receive the distributive shares of Mrs. Stevens and Mr. Lewis out of the legacy, and of the residue to which Julia

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was entitled, each is entitled to one-eighth. The provision in the will is not against vesting, or even against payment before twenty-two, but against an infant child having control before the ages specified. The surviving infant children will each be entitled to receive his or her share of Julia's estate upon arriving at the prescribed age, and need not wait until Julia would have been twenty-two years old. Nor can the younger children receive their part until they are of the designated age.

A third question is, whether Mrs. Stevens is entitled to have the income of Julia's share paid to her. The will directs the executors "to take care of all money and property devised and bequeathed to any of said children, except the income of each of them, which income their mother shall receive for their support and education until the children respectively shall be entitled to the control or management of the property devised and bequeathed." The words of the preceding clause forbid the payment of either the principal or income of Julia's share to the infant children until of the ages mentioned. This clause differs in not mentioning the share that one child may inherit from another; and although the words, "the income of each of them," might be held literally to include the income from inherited property, yet the location of these words directly after the "property bequeathed to any of said children," and the object of the payment—the support and education of a child now dead, leads inevitably to the conclusion that this direction does not include the income of the share bequeathed to a child who has died, or to the income to which the other infant children are entitled on their distributive portion of such share. If the provision made for the support and education of any child should not be sufficient (a case which can hardly arise here), this court could and would direct so much as necessary of the income of that child's share of Julia's estate to be appropriated for the purpose; otherwise, it must be accumulated by the trustees for the benefit of the infant.

A fourth question arises, as to securing Mrs. Stevens'

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right to one-third of the income out of Julia's share of the residue. As to the part of Julia's share in the residue coming to herself, there can be no difficulty. The executors must, during Mrs. Stevens' life, retain the one-third of the eighth of Julia's share in the residue coming to Mrs. Lewis, to secure the payment of the income on it to Mrs. Stevens.

SMITH and others *vs.* DRAKE and others.

1. If an administrator or other trustee, directly or indirectly, purchase lands at a sale made by himself as such, the sale will be set aside on application of the parties really interested.

2. Courts of equity will refuse relief even in cases of breach of trust, on account of the laches or unreasonable delay of those concerned to apply for relief. This doctrine is somewhat in analogy to the statute of limitations at law. But the time which constitutes the laches depends on the circumstances. In this case the suit was commenced seventeen years after the oldest son of the intestate, and five years after the youngest son came of age, and it was under the circumstances held not to be such laches as will bar the relief.

3. Such relief is always granted on equitable terms. The purchaser in this case was allowed the value added to the property by the improvements erected by him and the debts of his intestate, which he had paid out of the money arising from the sale declared void, with interest from the date of each payment, and was charged with the rent or occupation value of the premises from the time of the purchase, less one-third during the life of the widow of the intestate who had conveyed to him her right of dower.

4. The credibility of a witness is not affected by the fact that he is sixty-five years old.

Argued upon final hearing, on bill, answer, and proofs.

Mr. Kays and *Mr. R. Hamilton*, for complainants.

Mr. McCarter, for defendants.

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THE CHANCELLOR.

The complainants are five children of Alexander H. Smith, who died intestate in November, 1843. The defendant, Ethan Drake, was appointed administrator of his estate, having obtained an order of the Orphans Court of Sussex county for the sale of the real estate of his intestate for payment of debts, in March, 1846, sold the real estate, being one acre and lot in Newton, to one Dennis Cochran, at public sale, for \$1300. On the 28th of January, 1847, he conveyed this property to Cochran by deed of that date, and on the same day received a deed from Cochran and wife for the same. Both deeds were dated and acknowledged on the same day, and acknowledged before the same master.

Ethan Drake took possession of the property after the sale, put buildings in repair, added to them, and erected new buildings on the lot, and rented them and received the rents.

In 1843, at the death of their father, the oldest of the complainants was sixteen, the youngest four years old. The first of them died therefore of age in 1848, the last in 1860. The bill was filed in 1865, or five years after the youngest child came of age.

The complainants allege that the sale made nominally to Dennis Cochran was in reality made to Drake himself, for Ethan Drake was the agent. They ask to have the sale set aside on equitable terms, and the property conveyed to the complainants.

Ethan Drake, in his answer, denies that Cochran purchased for him, or that he was the real purchaser at the sale; and sets up the acquiescence of the complainants, and the time elapsed to elapse before filing the bill as a bar to the relief in equity.

The fact that Cochran purchased as the agent of Drake, is proved by the best possible evidence—that of Cochran himself: he testifies positively to it. He is contradicted by no one.

The only objections urged to his testimony are his age, and the fact that he does not recollect all the circumstances

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and particulars respecting the sale. He is sixty-five years old. No presumption arises against the capacity or credibility of a witness on account of having attained that age. Neither observation nor experience warrants it. Failure of memory or intellect may be shown by proof or his own examination, at that, or any other age. No witness has testified against his capacity, and the want of recollection of all the circumstances in his own testimony is not of the kind to show failure of intellect in any degree. He does not recollect whether the sale was by auction or private sale. If, as he testifies, he had no interest in the transaction, but was requested at a sale held at the inn kept by him, to purchase for Drake, it is not to be wondered at that after a lapse of more than twenty years, he does not recollect whether this one of the many like transactions that may have taken place there was at public or private sale, while at the same time he distinctly recollects receiving and giving a deed for this property without paying or receiving money, and that it was done at the request and as agent of Drake.

The facts appearing on the face of the deeds themselves are sufficient to raise the presumption that the purchase was by Drake. Chancellor Williamson, in *Obert v. Obert*, 2 *Stockt.* 103, held that the fact that David Smith, (the nominal purchaser,) was a man of no means, and that on the same day the administrator conveyed the property to Smith, he re-conveyed it to the administrator, is sufficient proof, without any explanation of the transaction, that the purchase was made through Smith for the benefit of Obert. In this case, without Cochran's evidence, the circumstances are sufficient to raise the presumption that the purchase was by Drake. This presumption could be rebutted by proof, but there is no such proof. And as the clear, positive proof of Cochran confirms the presumption arising from the papers, the fact that Cochran purchased for Drake must be considered as established; and upon well settled principles of equity the conveyance must be set aside as against the complainants, unless they are barred by their own laches.

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Courts of equity, though not within the statute of limitations, are generally guided by them in administering relief, either by presuming payment of claims, or acquiescence in a matter complained of by laches or unreasonable delay in seeking relief. When a like claim would be barred at law by the time elapsed, courts of equity generally consider the remedy at equity barred, and sometimes consider delay, even for a less time than required at law, such laches as will constitute a bar in equity; but this depends upon the particular circumstances of each case. And these doctrines are applied to trusts. *Story's Eq. Jur.*, §§ 1520, 1520 *a*, and 1520 *b*; *Obert v. Obert*, 1 *Beas.* 430; *Michoud v. Girod*, 4 *How.* 503. A case has been brought to my attention, where a delay longer than that in this case has been held sufficient to preclude relief.

In *McKnight v. Taylor*, 1 *How.* 161, nineteen years; in *Welman v. Wathan*, *Ib.* 189, eighteen years; and in *Gregory v. Gregory*, *Cooper*, 201, also eighteen years, were respectively held sufficient laches to bar relief.

But in *Obert v. Obert*, 2 *Stockt.* 98, in this court, and 1 *Ms.* 423, in the Court of Appeals, there were twenty-two years between the conveyance and filing the bill. The opinion in the Court of Appeals states that the complainant and his father, owners of two-twentieths, were under age for several years after the deed, and that Nancy Conklin, from whom he derived title to four-twentieths about 1837, was protected by coverture. The Chancellor states that Nancy Conklin was of age but does not mention her coverture, and observes, "but I do not think the statute should be applied;" and both courts say that the bar, by time, depends upon the circumstances of each case.

In cases of fraud it is held, that the time will be computed from the discovery of the fraud: *Story's Eq. Jur.*, § 1511; and the bill alleges that this fraud was not discovered until about one year before the commencement of the suit. The answer denies this allegation, but as it is not under the oath of the defendant, and is a fact of which the guardian has

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no personal knowledge, the denial amounts only to an allegation in pleading. But this made it incumbent on the complainants to prove the allegation if they claim the benefit of the fact; this they have not done.

The case as to the laches must be considered upon the other facts before the court. The suit, though eighteen years and a half after the deed, was commenced seventeen years after the oldest son was of age. The record of the deeds is no presumptive notice of the fact of fraud, even to those of full age, and the defendant, Nathan Drake, was the guardian of the two older children, which fact was calculated to give them confidence in the fairness of his transactions, and to put the best construction on those that would admit of different views. The younger children, who must act with them, did not all come of age until five years before the suit, and the estate not being large, nor the value over the price bid great, it was prudent to wait until all could proceed in one suit. Under these circumstances, the delay or laches in this case are not so great as to bar the remedy.

The complainants ask that the conveyance be set aside on equitable terms. On part of the defendant it is contended that the court should only allow the excess of the value at the time of the sale, above the bid of Cochran, with interest; as was done in the case of *Huston v. Cussey*, 2 *Beas.* 228, and 1 *McCarter* 320. In that case this course must be taken to have been pursued by the Chancellor for the reason that it was with the assent of the complainants, as it was really the most beneficial to them; he states his determination to make the reference in that manner with the reservation, "unless the complainants show cause to the contrary." He states that "the rule is inflexible, that a sale made by an administrator or any other acting in a fiduciary capacity to himself, or for his benefit, will be held void at the instance of the party prejudiced by such sale, and the purchaser regarded in equity as a trustee." And in *Obert v. Obert*, 2 *Stockt.* 103, to which he there refers, he said: "It is a matter of right in the complainant, and not of discretion in the court, to have the deed

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l out of his way and set aside." These are perfectly
it with the course pursued, if assented to by the com-
; but not with refusing to set aside the deed when
plainant insists upon it. In that case it is pretty
om the evidence, that the property would not have
\$6000 at that time, and, therefore, the decree, while
inst the defendant, was most beneficial to the com-
. The defendant here, as there, has been guilty of a
constructive breach of trust, and therefore must be
strict account; and the option in such case is always
ex cestui que trust.

he decree must be made on equitable terms. The de-
paid debts of his intestate to the amount of the sum
the property. He must be allowed that sum with in-
om the times when he paid it out, which, for the pur-
this case, must be assumed to be the date of the
of the deed. His final account was no doubt ad-
n that basis.

also expended moneys in the improvement of the
s. He must be allowed the additional value which
provements at the present time give to the premises,
that their value would have been now if these im-
ments had not been made. He is not to be allowed the
such improvements; they may have been unwisely
r their value have perished or depreciated by decay.
h allowance must not, in any case, exceed the cost of
improvements, for the defendant must make no profit
hem.

must account for all rents and profits received from the
s, or that might have been received by prudent man-
t and ordinary diligence, including a fair and full
ion rent for the same when occupied by him or his
and is to be credited for taxes actually paid, and all
y and usual repairs.

let Smith, the widow of the intestate, was entitled to
n the premises. On the 2d day of April, 1850, she
d this right to Drake. From that time until her

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death, Drake, by this deed, was entitled to one-third of the income, and therefore, during that period, must be charged with only two-thirds of the net value or income of the property.

If the occupation rent, and rents received from the property as improved, exceed the rents that could have been received from it as it was at the sale, kept in good repair, any excess in the actual cost of improvements above their present value to the property may be deducted from such excess of rents, and the defendant be charged with the balance only; as it is equitable that expenditures which gave additional temporary value to the premises should be repaid out of the additional income actually received by means of them.

Upon payment of the amount found due on these principles to the legal representatives of Nathan Drake, who is now dead, the conveyance to him will be declared void.

COOL'S EXECUTORS vs. HIGGINS and others.

1. Where a will directs the executors to erect and maintain a fence around a cemetery, and charges all legacies and expenses directed by it upon lands devised, the executors can maintain a suit in equity against the devisees of the land, or their assigns, for the expenses of erecting such fence. Whether they can maintain such suit for legacies charged on the land—*Quere*.

2. A sale of lands made by order of the Chancellor, by virtue of the provisions of the act to authorize the sale of lands limited over or in contingency, only conveys the estates of persons having vested or contingent estates in such lands, and who, by the statute, are required to have notice of the proceedings. The rights or liens of encumbrancers who are not required to have notice, or who do not have notice of the proceedings, are not affected by the sale. The purchaser holds subject to legacies charged on the lands.

3. The Chancellor has no power to order mortgagees or other encumbrancers to be paid out of the proceeds of such sale. The act requires that the whole proceeds shall be invested at interest, and directs specifically to whom the interest shall be paid. No other disposition can be made by the Chancellor.

Cool's Executors v. Higgins.

This cause was heard upon the separate general demurrer of Nathaniel Higgins, one of several defendants, to the bill of the complainants.

Mr. A. Wurts, for demurrer.

Mr. G. A. Allen, contra.

THE CHANCELLOR.

The bill sets forth that Leonard C. Cool, who died in 1861, by his will, dated December 19th, 1860, duly executed pass real estate, and proved and recorded, bequeathed to William Deats \$100, and to David Deats and to Josiah Deats \$100 each, not to be paid in ten years; that he directed his executors to erect and keep in repair an iron fence around a certain cemetery lot, and directed that if his widow should marry again, she should be paid an annuity of \$50 for fifteen years; and that the will "charged his estate with the payment of the legacies, expenses, and whatever may be necessary for carrying out the will."

The bill further states that the personal estate of the testator was consumed by the payment of his debts and testamentary expenses, except a balance of \$20, ascertained by the settlement of the final account of the executors by the proper Orphans Court; that the legacies were all unpaid, and that the executors needed \$500 to erect the cemetery fence as directed by the will; and that the personal estate being exhausted, there was no funds in their hands, except the residue of \$20, for these purposes.

The bill further states that the testator, by his will, gave to his real and personal estate, subject to the charges in his will, to his two daughters for their respective lives, and the residue of each, after her death, to her issue; and if one should die without issue, and the other leave issue, then all to such issue after the death of the survivor; and if both should die without issue, then the whole to go to testator's brother and sisters.

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The bill further sets forth a deed dated March 28th, 1868, executed under the direction of this court by one of its special masters, to the defendant, Nathaniel Higgins. In this deed it is recited that this court, upon the petition of Anna Merriam, (who must be taken for one of the daughters and legatees of the testator,) and proceedings had under the act for the sale of lands limited over to infants or in contingency, ordered these lands to be sold in fee; that the special master made such sale to Higgins, and this had been confirmed by the court, which had also ordered the conveyance to be executed. To these proceedings, as appears by the order recited and by a specific allegation in the bill, neither the complainants nor legatees were made parties, nor had they any notice of the proceedings.

The bill is filed against Higgins, the purchaser, the two daughters of the testator and their husbands, and some other parties whose interest does not appear, and prays that the legacies and amount required for the cemetery fence may be declared a lien on the lands, and that Higgins and the other defendants, or some of them, may be decreed to pay the same, and that the same may be ordered to be paid out of the proceeds of the sale of the lands, invested under the order of this court, and for other equitable relief.

The first ground taken in support of the demurrer is, that the complainants, as executors, have no right to bring suit for the legacies or the money required for the cemetery fence.

Whatever may be the rule as to the legacies which are due to the respective legatees, and not to the executors, who are not liable for the same, except to the amount of the personal estate in their hands, yet as they are specially directed by the will to erect a fence around the cemetery lot, and no one else is either required or authorized to do it, and the amount required for it being clearly charged upon the land, the suit for it is rightly brought by the executors. As the demurrer is to the whole bill, if the bill is right in any particular, the demurrer must be overruled as too broad, and it is therefore

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sary to determine whether the executors can maintain suit for the legacies.

second ground taken to sustain the demurrer of Higgins, that neither he nor the land is liable for these claims on it in the will; that the land was sold by order of the court on proceedings under the act for the sale of lands limited; that the act authorizes the Chancellor to direct the land to be sold in fee, and that it was so directed. A sale of the fee simple of the lands, free from the limitations, is what was intended to be effected by this act, and is all that is demanded. A sale of the fee does not include, in the term itself, freedom from encumbrances, but only the nature of the estate distinguished from a life estate, a remainder, a fee simple, or any estate less than a fee simple. Land is frequently sold as fee simple subject to encumbrances, and this mode of sale is common among conveyancers and in legal proceedings, and involves no contradiction or inconsistency. The act is framed for avoiding liens or encumbrances. It requires a certain process. No notice is to be given, except to such persons as are entitled to vested or prospective estates in the land. No provision is made for notice to encumbrancers or claimants. The proceeding can be by petition only, or by bill, and no subpoena or other process can be used. The act directs the purchase money to be invested, the interest paid to the tenants of the particular estates in the land, and the land would have vested in some one in fee, and then the principal, or the proper share of it, to be paid to such person as might be entitled to it. I think that the only intention and effect of this act was to sell the land free from limitations, and not to disturb existing encumbrances or liens upon it, not legal estates or equitable interests.

The act authorizes the Chancellor, when justice requires it, to direct that part of the interest only shall be paid to the tenant of the particular estate, and the residue to accumulate for the benefit of the tenant in remainder. In this case the Chancellor directed to pay only part of the income to the life tenant. It is deduced that the surplus may be or was intended for the

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payment of these liens. The order has not been set out, but I must presume it was not for this purpose, because that is not warranted by the act.

When this act was drawn and presented to the legislature great doubts were had of the constitutional power of the legislature to authorize the sale of the estate of a remainder-man if such sale was intended for the benefit of the particular tenant at the expense of the remainder-man. It is clear that the legislature, not having power to give the property of one man to another, could not enact that in such case the title of the remainder-man should vest in the life tenant, nor burden the remainder with the debts or expenses of the life tenant. Ordering a sale of lands from which a life tenant, who is only entitled to the use or income, can receive but little, and giving him a largely increased annuity by interest double the income, would benefit him at the expense of the remainder-man, who is entitled to the lands with the natural increase in value at the termination of the preceding estate. This seemed the exercise of the same power as conveying the remainder to the life tenant, and subject to the same objections. The act only authorizes the sale where it will promote the interest of the owners of the particular and future estates, and when it would be the interest of any one who might own the lands in fee to sell. This limitation of the power protects the tenant in remainder. If it will injure his interest the sale must not be directed. In many cases, especially where lands are in or near growing cities, this would make the act of no avail, except for the provision in the sixth section, which provides, that the Chancellor, by accumulating part of the income for the remainder-man, may recompense him for the loss of increase in value. If this power is wisely exercised, it will prevent all injury to the remainder-man in cases where it would be the interest of the owner of the fee to sell.

Whether the scruples of the draftsman of the act were well founded or not, such are its provisions; and the part of the income directed to be accumulated cannot be used to pay encumbrances. If any part has been used for such purpose as

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asserted at the argument, such use is unlawful and should be made no further. This fund is the property of the remainderman, under protection of this court.

The decree to sell in such case operates, like all other decrees or judgments of this or any other court, only upon the rights of the parties to the suit, or where a proceeding is *in rem* as this is, upon the property, so far as authorized by law. If Mr. Higgins was ignorant with regard to his rights he must, like other purchasers who purchase at a sale by a sheriff, or order of any court, who often suppose that they buy free from all encumbrances, take the property subject to all pre-existing liens and encumbrances.

The demurrer must be overruled.

MINGUS vs. CONDIT.

A purchaser of lands from a grantee whose deed is void against the creditors of his grantor by the statute of frauds, will not be protected by the provisions of the sixth section in favor of *bona fide* purchasers for valuable consideration, unless he has parted with something of value in the purchase. A conveyance or mortgage for a pre-existing debt, without parting with some security, is not for a valuable consideration within the provisions of that section.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Hayes and *Mr. McCarter*, for complainant.

Mr. Runyon, for defendant.

THE CHANCELLOR.

In March, 1865, lands in Newark, the premises in question in this suit, were conveyed in fee to Nathan Mingus, subject to a previous mortgage to the executors of H. C. Jones, for \$3000, which Mingus assumed to pay. On the 24th day of May, 1866, Mingus being in failing circum-

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stances, for the purpose of delaying and defrauding his creditors, by deed of that date conveyed these lands to his mother, Margaret Mingus. This deed was left by Nathan on the same day at the office of the clerk of Essex county, and duly recorded. Margaret Mingus did not know of the execution of the deed until after it was recorded, when Nathan brought it home and threw it in a closet in her house, in which he lived with her as one of her family. It was not shown or handed to her; she never paid the consideration mentioned of \$5200, or any consideration whatever; nor does any act of hers appear which can be construed into an acceptance of the deed, until the execution of a mortgage of the premises by her to James W. Tichenor, on the 1st day of September, 1866.

The complainant, William T. Mingus, a son of Margaret and brother of Nathan, living in the same house with them, on the 19th day of July, 1866, obtained a judgment against Nathan in the Circuit Court of Essex county for \$2819.34, by confession. Upon an execution issued on this judgment the premises were, by the sheriff of Essex county, sold and conveyed to the complainant on the 4th day of October, 1867. Under this he claimed and kept possession.

Jones' executors filed a bill to foreclose their mortgage, making J. W. Tichenor a defendant, but not making William T. Mingus a defendant. A decree for foreclosure and sale was had in that suit, and a sale was had under the decree, October 18th, 1867. The premises were sold to the defendant, Daniel Condit, for \$3700, and a deed was executed to him by the sheriff.

In the presence of Condit at the time of the sale, the complainant gave notice that he claimed title as against all but Jones' executors, by virtue of the deed of the sheriff to him; that the deed to Margaret Mingus was fraudulent and void, and that Tichenor knew it when he received his mortgage; and that he, William, would claim the right to redeem the lands by paying off the Jones mortgage and costs of foreclosure.

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mortgage to Tichenor was given to secure the bond an for \$3500, given in part payment of a debt of which he owed to Tichenor. This was the only con- m. Nothing was paid at the time, and no security an up or surrendered.

conveyance to Margaret Mingus is as to her clearly against the complainant, and all other creditors of Mingus. The question is whether the mortgage by Tichenor is not within the protection of the sixth of the statute of frauds. There is not sufficient evi- show that Tichenor knew of the fraud in the con- of Nathan to his mother; the allegations of the bill respect are not sustained. He must be considered as age in good faith. The only question is whether a e taken as this was to secure a precedent debt, without up any security, is upon good consideration within nt and object of that section.

section has been construed as if intended to protect only ia *fide* purchasers as would have been injured by the t provisions of the second and third sections, and only would otherwise have been injured. And it has, e, been held that a deed or mortgage to a *bona fide* er or mortgagee for which the only consideration is nent of a previous debt, is not within the protection section. Such purchaser or mortgagee would be left ame situation as before.

is the doctrine held in *Root v. French*, 13 Wend. forse v. *Godfrey*, 3 Story 389; *Dickerson v. Tilling- Paige* 215; *Padgett v. Lawrence*, 10 Paige 170; v. *Hulse*, 29 Barb. 540; *Manhattan Co. v. Everson*, 457.

ie case of *Allaire v. Hartshorne*, 1 Zab. 665, the of the court declaring that as to negotiable commer- er, a pre-existing debt is a sufficient consideration to ie endorsee a holder for valuable consideration, states e rule of equity regulating the transfer of property is urchaser who has obtained title as a mere security for

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or payment of a pre-existing debt, without parting with anything of value, is not entitled to the character of a *bona fide* purchaser for value. I feel constrained to consider this as the law of this state.

The mortgage to Tichenor is, therefore, void as against the complainant, and the title purchased by Condit at the foreclosure sale is affected by all the equities existing in favor of the complainant. That equity consists in the right to redeem the premises by paying to the defendant the full amount of principal, interest, and costs due to the complainants in the foreclosure suit, and upon such payment to have a conveyance of the property from Condit to him.

DIXON vs. DIXON.

A conveyance made by a husband to a trustee for the use of his wife, on the execution of articles of separation between them, will not be set aside on account of the subsequent adultery of the wife while living separate from him.

On rule to show cause why an injunction should not issue.

Mr. Ransom, for complainant.

Mr. Dixon, for defendants.

THE CHANCELLOR.

The bill filed is to set aside a conveyance made to J. Dixon, Jr., as trustee for Annie Dixon, the complainant's wife. The conveyance was of the undivided half of a house and lot, and was given in settlement of a suit in this court by Mrs. Dixon against her husband, for maintenance. The reason urged for setting aside this conveyance is, that she had been, before that conveyance, guilty of adultery, and that this was concealed from her husband; and that she since has been

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living in adultery in the state of New York, in which state he since obtained a divorce from her on that ground. The deed was made and dated on the 3d day of August, 1869. The complainant filed a bill to set aside that deed on grounds entirely different, which, on the hearing, was dismissed. This bill purports to be a bill of review, and if not properly filed as a bill of review, it can be maintained as an original bill on the grounds alleged, which did not and could not come in controversy on the first suit.

After the decree in that suit the trustee filed a bill for partition, and in the partition suit the property not being divisible, was ordered to be sold. Under that order it was advertised for sale, and the injunction now applied for is to restrain that sale until the determination of this suit.

The allegations of the bill as to adultery before the settlement and conveyance, are not sustained by the affidavits annexed to it, or in any other way. And the defendant, Annie Dixon, produced on the argument her own affidavit and that of the co-adulterer, denying most positively any adultery before the date of these conveyances; these may be taken as an implied admission of it after that time. But a deed or settlement of this kind, if good at its execution and delivery, will not be set aside for adultery or any misconduct of the wife afterwards. *Sidney v. Sidney*, 3 P. W. 269; *Jee v. Thurlow*, 2 B. & C. 547; *Field v. Serres*, 4 B. & P. 121; *Baynom v. Batley*, 8 Bing. 255; *Babcock v. Smith*, 22 Pick. 61; *Seagrave v. Seagrave*, 13 Ves. 439; *Forrest v. Forrest*, 9 Abb. Pr. Rep. 289.

It is not necessary to determine whether acts of adultery prior to the settlement, would be good reason to set it aside; none such are in any way proved, or attempted to be proved. And an injunction is not granted upon the mere allegation in the bill of the facts necessary to sustain it; there must be satisfactory proof.

The rule to show cause must be discharged, with costs.

Mechanics Mutual Loan Association v. Albertson.

MECHANICS MUTUAL LOAN ASSOCIATION vs. ALBERTSON
and others.

1. The filing the written contract provided for by the second section of the mechanics' lien law, only protects the building from liens for work or materials furnished to the contractor. If the owner orders materials or employs mechanics on his own account, a lien attaches for the same.

2. The mechanics' lien law was not intended to protect purchasers or mortgagees, but mechanics and material-men only. Many of its provisions are necessarily, to effect its object, opposed to the policy of the registry acts of this state, and make it impossible for a mortgagee or purchaser, at certain times, to ascertain what encumbrances exist. The express provisions of this act cannot be construed against the plain meaning of the words, so as to carry out the policy and intention of the registry acts.

These two causes were argued together, upon the pleadings and proofs, the questions and the facts upon which they depend being the same in both causes.

Mr. Shreve and *Mr. J. Wilson*, for complainants.

Mr. E. T. Green, for Fish and Green.

Mr. Holt, for McPherson and others.

THE CHANCELLOR.

The claims of the defendants upon the property in the mortgages of the complainants, which they seek to foreclose, are claims under the mechanics' lien law. The question arises upon the effect of filing a building contract under the provisions of the second section of that law.

Albertson, the mortgagor, by a written contract made with John Farrel on the 26th day of January, 1871, and filed in the office of the clerk of Mercer county on the same day, employed and contracted with Farrel to build eight houses on eight adjoining lots of Albertson, in the city of Trenton.

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In this contract he agreed to provide, at his own expense, all the materials for these buildings, and to deliver them, completely finished, by the 25th of March then next.

When he began to execute the contract, Farrel had neither money nor credit to procure the materials, and, at his request, Albertson went to the defendants, material-men in Trenton, and directed them to furnish the materials on his account. They did so furnish them on the credit of Albertson, and charged the same to him.

Albertson being a member of the association of each of the complainants, applied to each for a loan of \$1600 on four of these houses and lots, and executed a separate mortgage to each, dated June 26th, 1871, to secure the loan of \$1600. The four lots in each mortgage were different from those in the other mortgage.

The complainants and their solicitor, at the making of the loan, knew of the contract, and that it was filed, and knew that Farrel erected the buildings, and supposed that he furnished the materials, and that there could be no lien on them for any work or materials provided for in the contract on file.

The defendants claim that Albertson, as the owner of the land, had the right to purchase on his own credit, materials for buildings on them, and that the land was subject to a lien for these, without regard to any contract.

The second section of the lien law provides that when a building is erected by contract in writing, the building and land shall be liable to the contractor alone for materials furnished in pursuance of said contract, provided the contract be filed before the materials are furnished. In this case the contract was filed before the materials were furnished, except, perhaps, a very small part of them.

But the materials were not furnished pursuant to the contract. That required Farrel to furnish them. They were furnished by Albertson. It is clear that the object of the provision in question was to protect the owner, who, by filing his contract, was freed from all claims by mechanics or material-men, and could thus safely make his payments according

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to contract. Mechanics and material-men must take notice of such filing, and that by it they are deprived of their lien on the building, and must see to it that the contractor pays or secures his indebtedness to them. The object of it was not to secure a mortgagee or purchaser, and its construction cannot be guided by such supposed intention. If its provisions, by their proper and natural meaning, have that effect, the mortgagee and purchaser are entitled to the benefit of it, because they must be held to have acted on the faith of such provision.

There is nothing here that requires a construction different from the proper and usual meaning of the words of the act. They only protect it from a lien for materials furnished in pursuance of the contract. When the contractor furnishes such materials, and the owner pays him for them, it is right that the owner and the building should be free. When the contractor does not furnish them, but a stranger does, it is not right or equitable that the building should be freed from the lien of the material-men. It would be against the policy of the act, as well as the object and intention of this section. If no effect is given to the words "in pursuance of the contract," then the section would make the building liable to the contractor for the materials furnished by another, on the credit of the owner. The construction which gives effect to the words of the section in their usual import, rejecting none, comports best with the object of the act and of this section, and is not inconsistent with any other provision.

The counsel of the complainants chiefly urge that such construction would be unjust to mortgagees and purchasers, who rely on the recording of the contract, and cannot be expected to inquire whether the buildings erected were erected according to the filed contract, or by a new arrangement, in disregard of it.

This act was not intended for the protection of mortgagees or purchasers as a part of the system of the registry law, so long part of the state policy, but, in utter disregard of it, makes lands liable for debts which need not be registered for a year after contracted, without any possibility of a purchaser

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or mortgagee finding out with certainty whether there are such claims. The mechanics and material-men could not be efficiently protected without some risk to the mortgagee and purchaser, and the legislature, when one must suffer, have chosen to protect the former at the expense of the capitalist. It has, in this case, thrown the burden of inquiring whether the work is done or materials furnished in pursuance of the contract upon the mortgagee or purchaser, as in the other case it has required the mechanic and material-man to ascertain whether a contract is filed before each day's work is done and each load of material delivered.

A wiser and more just law than the mechanics' lien law can be imagined, even if its enactment could not be procured. But it is the duty of the court to administer the law as it exists, and to construe it as its intention is shown by its provisions.

In these cases the claims of the defendants for materials must be paid before the amounts due to the complainants on their mortgages.

HAVENS vs. THOMPSON and ALLEN.

1. An advancement in money, made by a father in his lifetime to one of his sons, cannot have any effect upon the share of the real estate of the father, which, at his death, descends to the son. Only advancements or settlements in land can have such effect.

2. Whether an agreement by parol, or in writing without seal, by a son with his father, on receiving an advancement in money, that it shall be in full of the son's share of the father's real estate at his death, can have any effect.—*Quære*.

On motion to dissolve injunction.

Mr. McLean, for motion.

Mr. W. H. Vredenburg, contra.

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THE CHANCELLOR.

Daniel Havens, the father of the complainants, died intestate on the 3d day of April, 1871, seized of a farm in Monmouth county. He had, in his life, made advances to his son, Benjamin L. Havens, in money, and on the 7th of January, 1867, advanced him the further sum of \$600, upon an agreement that it was to be in full of all the share of Benjamin in his farm, after his decease, and that he was to have no other portion therein after his father's death; and Benjamin, upon the payment of the \$600, gave and signed a receipt in these words: "January 7th, 1867. Received of Daniel Havens the sum of six hundred dollars, in lieu of dowry."

On the 8th of May, 1871, the defendant, Thompson, sued out a writ of foreign attachment from the Court of Common Pleas of Monmouth county, against the estate of Benjamin, who had removed out of the state, and was residing in Missouri. Under this writ, the interest of Benjamin in his father's farm was attached by the sheriff before the 25th of that month, and such proceedings were had that judgment was entered in favor of Thompson against Benjamin. And thereupon, the defendant Allen, who had been appointed auditor by order of the court, advertised the estate of Benjamin in his father's farm for sale.

On the 20th of October, 1871, after the issue and execution of the attachment, Benjamin conveyed and released his interest in the farm to the complainants, two of the sons of Daniel Havens.

The complainants file their bill under the act of 1870, to compel the determination of claims to real estate and to quiet title. The object of the suit is to have an adjudication that will settle the validity of the claim under the attachment, and the object of the injunction is to prevent a sale until the title is thus settled. If it is clear that the claim of the defendants is a legal and just lien upon the estate, the injunction should not be retained, or the defendants further delayed in their remedy.

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The complainants contend, first, that the advancements made by the father of Benjamin will, under the first section of the act of descents, cut him off from any part of the real estate of his father, unless it positively appears that the advancements were not equal to his share; and secondly, the agreement at the time of the advancement of \$600, on January 7th, 1867, and the receipt then given, will prevent Benjamin from inheriting any of the real estate, and so prevent the defendants having any lien by the attachment.

The act of descents only bars a child from inheriting when the advancement is made in land; it has no reference to any advancements in money, or in any other way than by real estate. There is no authority or decision for extending this provision beyond the clear meaning of its words. The thirteenth section of the act concerning executors and administrators, which is substantially the same as the English statute of distributions, makes provision for the deduction from the distributive shares of each child of any land or estate, by settlement or any advancements, clearly including both lands and money.

The provision in the act of descents for advances was an innovation upon the law of England. It could have no place there except between coparceners, and lands held in gavel kind; all else went to the eldest son. And in introducing the principle into the legislation of this state, the more general and just provisions of the statute of distributions were disregarded; whether purposely or by inattention, the result is the same. The courts cannot supply the omission or the designed unfairness of the legislation.

The effect of the agreement, on the payment of the last advance of \$600, and of the receipt then given, presents a different question. It is certainly just and right that effect should be given to such agreement. If the father advanced to his son what was agreed upon, and believed to be his full share of the inheritance upon such agreement, and died intestate, in full faith that the agreement and receipt would shut out a son who had received his full share, from claiming

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more at his death, it would be great injustice to the other children to allow Benjamin or his creditors to participate in the estate left by him.

The question, whether this should prevent Benjamin from inheriting under the act of descents, is one peculiarly proper to be decided by the courts of law. It has never been raised or decided in this state. The only authorities I find on the subject are in Massachusetts, in *Quarles v. Quarles*, 4 Mass. 680, and in *Kennedy v. Tucker*, 8 Mass. 143. It was held that a release executed by a son to a father, on an advancement by him, from all further claims on his estate after his death, was sufficient to bar the son after the death of the father, intestate; and in one of the cases, where the son died before the father, was held sufficient to bar his children, who were the direct heirs, and had executed no release.

In those cases the releases were instruments under seal, and expressly released the estate and the heirs of the father; but as there was no estate or right to pass by the release, or upon which it could operate, the only effect to be given to these instruments, was that of agreements upon fair consideration. They could have no technical effect as conveyances to pass the estate. And by way of estoppel *in pais* they have no more force than the parol agreement and receipt in this case, which were intended to induce, and did induce, the testator to rely upon them to effect a just division of his estate without making a will.

But this case differs from the cases in Massachusetts, in the circumstance that in them, the intent and agreement was fully expressed in the releases, writings signed and under seal. There could be little danger of fraud by perjury, which the statute of frauds in all cases of title to lands, and the statute of wills providing against parol proof of the intentions of a dead man, seem designed to prevent. But in many cases children may be tempted to procure parol evidence, that on payment of an advance to a brother by a deceased father he had agreed to accept it in full of his share of the estate after the father's death. In this case the receipt is so indefinite

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It is unintelligible that its whole effect depends on parol testimony, and I hesitate much in adopting a rule that will place much on parol testimony, in cases where the question will arise many years after the transaction. I shall therefore not determine it on this motion to dissolve the preliminary injunction.

By the provision of the act of 1870, the question must, on application of either party, be referred to the courts of law to decide. If not so referred in this way, this court will, on the final hearing, decide it.

In the meantime, as a sale under the attachment, with this question unsettled, cannot be fairly had, and may occasion a great sacrifice, and as a delay cannot be of serious injury to the defendants, I will, in exercise of the discretion incumbent on this court in such cases, retain the injunction until the final hearing.

YOUNG vs. VOUGH and others.

1. If a shareholder in a national bank places part of his shares in the hands of a third person to hold for him, under a secret declaration of trust, and allows him to be elected a director, and himself votes for him, and allows him for years, although he owns no other shares, to take the oath required by the National Banking Law, that he is the *bona fide* owner of his stock, and declares that one of his objects in doing so is to give him credit and aid him in business, this is such fraud as will estop him from denying that such actual holder was the owner of the shares, as against a creditor who trusted him on the faith of being such owner.

2. A by-law of a national bank, declaring that no shares shall be transferred while the holder is indebted to the bank, is authorized by the act of Congress, and is a reasonable by-law; and any attempted transfer by a shareholder while indebted to the bank, is void. And an endorser who pays the note by which such debt is created, is subrogated to the rights of the bank as against such shares of its capital stock.

Argued on final hearing, upon pleadings and proofs.

Young v. Vough.

Mr. Vanatta, for complainant.

Mr. Shipman, for defendant Mattison.

THE CHANCELLOR.

The complainant seeks to compel the First National Bank at Washington, in the county of Warren, one of the defendants to this suit, to transfer to him on their books, ten shares of their capital stock, sold to him by the sheriff of Warren county, on an execution against the defendant, Vough, July 10th, 1868. The defendant, Mattison, claims that these shares were lawfully transferred to him by Vough on the 2d day of June, 1868, before the judgment, execution, or levy, under which they were sold by the sheriff.

Mattison is a director and the principal stockholder of the bank, and had been so from its organization, in 1864. Vough had been a director, and had held thirty shares of the stock from or shortly after the organization of the bank until June 2d, 1864. Mattison, who was the chief promoter of the organization, had desired to take a controlling amount of the stock, but others, whom he desired to take part in it, objected to this, and to having anything to do with it, unless each shareholder was limited to one hundred shares. Mattison agreed to this, and took only one hundred shares in his own name, but obtained control of a larger amount of stock by procuring others to subscribe and hold the stock for him, he furnishing the money to pay for it. He procured Vough to subscribe for thirty shares, and furnished \$3000 to pay for it, and took a declaration of trust from him, with an agreement to pay over the dividends, and, on request, to transfer the stock. The cover was continued by letting Vough draw and receipt for the half-yearly dividends, which he paid over to Mattison. Vough was elected a director at the annual elections, receiving Mattison's vote; and with Mattison's knowledge, at each election, took and subscribed the oath required by the act of Congress establishing national banks, that he was the *bona fide* owner in his own right, of at least ten shares of the capi-

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'said bank, standing in his name on the books of
tion, and that the same were not pledged or
ed for any loan or debt.

he complainant, on the 4th of May, 1868, took
Vough for \$700, payable in one month, in part
f a note of \$5000, which Mattison, Vough, and
ld, had given him for mules, previously sold to
is was done with Mattison's knowledge. This
scounted at the bank, which held it on the 2d o
. The transfer of the stock was made on that day
without the knowledge of Mattison. Vough went
ing-house in the absence of the cashier, who has
of the transfer book, and requested the teller to
nsfer for him. The teller told him it was no part
it was the duty of the cashier. But upon being
ough, he produced the transfer book, filled up a
thirty shares to Mattison, which was signed by
l witnessed by Woodruff, the teller. Vough, at
ime, drew out the whole balance of his account,
\$300, and about this time failed in his business.
ier, on his return, and the directors of the bank,
xt meeting, disavowed this transfer, declared it
refused to allow it to be entered on the stock
issue certificates on it. Mattison, when informed
e of Vough, called to inquire if a transfer had
to him.

, at its organization, had adopted by-laws, framed
l by Mattison. One of these by-laws declares,
sfer of stock shall be made by any stockholder
ted to the bank, whether the debt is due or not.
er and directors refused to permit and carry out
on the ground that Vough was indebted to the
s and other notes, and that the by-laws prevented
r. When Young paid the \$700 note on the 8th
cashier told him that if he paid off the note he
the same rights on the stock that they had.
by the sheriff would, of itself, transfer the stock

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to the complainant, if it had not been transferred to M and if there was no prior lien upon it by the bank.

The complainant contends, that the transfer to M was both illegal and fraudulent. The illegality consists being a violation of the by-laws of the bank. The section of the act of Congress, 13 *Stat. at Large* 102, that the shares shall be personal property, and transfer the books of the association, in such manner as may be prescribed in the by-laws or articles of association; and eight declares that the directors shall have power to regulate by by-laws the manner in which the stock of the association shall be transferred, its general business conducted, its privileges exercised and enjoyed.

A by-law of a money corporation, declaring that the debt of a stockholder shall be a lien on his stock, and that he shall not transfer it until such debt is paid, is held to be a valid and legal by-law. *Stebbins v. Phoenix Fire Ins. Co.*, 350; *Angell and Ames on Corp.*, §§ 355 and 356; cases there cited.

Mattison knew of this by-law, and cannot find shelter from the doubt somewhere suggested, whether a bona fide purchaser, who had no notice of such by-law, could be bound by it. This transfer then being made in violation of the by-law, and being disagreed to, and repudiated by the directors and by the directors of the bank, was illegal. Vough made it, and the teller, when he suffered it, knew it was illegal. And this illegality was not cured by the subsequent payment of the debt to the bank by Young. Vough was the principal and real debtor, and Young, as endorser, was a surety. If notice of non-payment had not been given, Vough could have been discharged. When he paid it he was subrogated to all the rights of a surety, one of which is to be substituted in place of the creditor, and to have all the collateral securities which the creditor had. That in this case Vough had a lien upon the stock, and to prevent its transfer until the debt was paid by the real debtor. This doctrine of subrogation is derived from the civil law, and eminently just, is a

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and enforced in courts of equity, both in England and this country. *Wright v. Morley*, 11 *Ves.* 23; *Robinson v. Wilson*, 2 *Madd.* 569; *Cheesebrough v. Millard*, 1 *Johns. Ch.* 413; *Hayes v. Ward*, 4 *Johns. Ch.* 130; *Clason v. Morris*, 10 *Johns. R.* 524; *Story's Eq. Jur.*, § 638.

At the time of the sale by the sheriff, this note had not been paid by Vough. It was a lien upon this stock, and the attempted transfer by Vough still continued unlawful and void as against Young.

The fraud charged by the complainant in his bill, that at the giving of this note Mattison represented that Vough was responsible, owned \$3000 of stock in this bank, and was a director of it, has not been sustained by proof. Young himself testifies to it; but both Mattison and Vough, whom he says were present, deny it. The only fraud is that arising from Vough being held out to the world by Mattison as the owner of this stock, for the purpose of inducing others to give him a credit that he was not entitled to. Such fraud may operate by way of estoppel to prevent him from denying that Vough was the owner as against those who had been induced, by his conduct and representations, to trust Vough on the strength of it. Had the allegations of the bill been sustained, that Mattison, to induce Young to accept the individual note of Vough for a debt secured by two others, represented that Vough owned these thirty shares, and Young acted on it, Mattison would here be estopped from denying it.

For an estoppel *in pais*, it is necessary not only that the party to be estopped made false representations, and that some one acted upon them, but that the party making the representation should intend to influence the conduct of another, or should have reason to believe that it would influence such conduct. This was the result arrived at in the decision of the case of *Kuhl v. Jersey City*, made at the last February Term in this court, after a full consideration of the authorities.

Here Mattison, by the purchase in the name of Vough, by voting for him as director, and by permitting him to make the oath that he was the *bona fide* owner in his own right, and

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acting with him as director, represented and held out Vough as the owner of these shares, free from his claim. But if he did this only to blind such stockholders as objected to his owning more than one hundred shares, or for the purpose of having a pliant tool in the board, he is not estopped; he must have done it for the purpose of giving him credit, and of inducing Young or the public to trust him, or must have foreseen that it would have that effect.

In this case, Robert P. Strader testifies that Mattison told him "that Vough was a young man and out of business, and he had done it to give him a credit and use him whenever he wanted to, and he would not have got that position if it had not been for him." Young testifies that Mattison told him that "he had helped him to get this stock, and lent him the money, and tried to help him along to give him a start and a credit."

From these admissions, and from the whole circumstances surrounding the affair, I am satisfied that one of the objects of Mattison, in his conduct and double dealing with regard to this stock, was to give Vough a credit he was not entitled to, and could not have otherwise got, and that he must have known and foreseen that it must have that effect. I think, too, the conclusion is inevitable that when he saw Young give up a good security for this \$700 note, he knew that Young would not have done it but for the credit which owning this stock and being a director of the bank had given him, and that if he had not then been silent, but had disclosed the truth, Young would not have taken that note. His silence at that time confirmed and continued the impression made by his former false and fraudulent acts, and now must estop him from asserting the truth which he then concealed. The application of the sometimes unjust doctrine of estoppel appears to me in this to be most righteous.

The complainant is entitled to a decree that the bank shall transfer to him on their books the ten shares sold to him by the sheriff, and issue a certificate for them, and that the de-

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That Mattison be forever debarred from claiming the same,
 that the transfer made of them to him by Vough is void;
 that the defendant Mattison pay the costs of the com-
 plaint.

DOUGLAS *vs.* MERCELES and others.

Where six of seven associates in a purchase of land on speculation, agreed to take a specified number of the twelve and a half shares which the scheme was divided, at a fixed price per share, and also agreed to take the shares in the scheme that might remain unsold, each in proportion to the shares taken by him, at the same price per share, and another associate subscribes for a half share, but refuses to enter into the agreement to take a proportion of unsold shares, the owner of the half share is not entitled, on winding up and settling the scheme, to any part of the unsold shares or of the profits on them.

And, on the other hand, the shareholders who agreed to purchase shares, are bound to pay and account for the full price of those unsold shares and the interest on that price, out of their own funds, and cannot recover any part of the profits in the scheme appropriated to pay for those shares before these profits are divided.

Argued on final hearing, upon pleadings and proofs.

Mr. A. B. Woodruff, for complainant.

Mr. J. Van Blarcom, for defendants.

THE CHANCELLOR.

The defendant, Cornelius Van Winkle, on the 28th day of August, 1866, entered into a written agreement with the complainant and Merceles, Goetschins, Scott, Bell, and Hewson, five of the defendants, that in consideration of \$35,000 cash then paid him, and \$90,000 to be paid, he would convey to them his farm in Passaic county. And these purchasers agreed that they would pay him said \$90,000 in the manner therein stipulated, with interest, to be paid half-yearly, until the whole was paid. This \$90,000 was to be

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paid by the sale of lots by the associate purchasers, which Van Winkle agreed to convey at their request, (provided it was for reasonable prices,) upon receiving the whole proceeds on account. When \$100,000 was paid on the whole, he agreed to convey the residue of the farm and take a mortgage for the balance with interest, payable in two years.

At the time of this contract there was a verbal understanding that the purchase was to be divided into twelve and a half shares of \$10,000 each, and it was expected and intended that other persons could be induced to associate themselves with the purchasers and take shares. It was also understood verbally, that the complainant would assume but half a share, and that Merceles, Bell, and Scott would each assume one share and a half, and that Goetschins and Hewson would each assume one share. And in this proportion each paid in his part of the \$35,000—that is, the complainant paid \$2500, Merceles, Bell, and Scott, each paid \$7500, and Goetschins and Hewson, each \$5000.

Some weeks afterwards the agreement was reduced to writing, and two papers were drawn and executed for the purpose of manifesting it. Cornelius Van Winkle had been admitted by the associated purchasers to become one of their associates in the speculation, and to hold one share or \$10,000 in the scheme. He paid his part of the first installment by endorsing on the article of sale a receipt for \$5000 in cash, thus making the amount paid \$40,000, instead of \$35,000, and leaving the amount to be paid, \$85,000.

The first of these two papers stipulated that the purchase should be divided into twelve and a half shares of \$10,000 each, and that the parties signing it each assumed to take and pay for at that rate, each share or part of a share set opposite his name. And each one further agreed that if the whole number of twelve and a half shares should not be subscribed for, that he should take and pay for a part of the remaining shares, or parts of shares, in the ratio or proportion of the shares subscribed for by him. And it was agreed

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that all costs, expenses, and disbursements, losses, gains, increase, and emoluments should be suffered, borne, paid, divided, and distributed among the subscribers in the ratio and proportion of the shares and interest of each of the subscribers.

This writing was signed by Merceles, Bell, and Scott, respectively, with one and a half shares, and by Goetschins, Hewson, and Van Winkle, with one share each. The complainant declined signing it, though urged by the others, on the ground that he was not willing to assume the responsibility for more than one-half share, the amount for which he originally had agreed. He feared that the speculation would be unsuccessful; that Van Winkle would get the property back, and might call upon them for the balance of the consideration according to their interest, and he was not willing to assume more than the one-twenty-fifth, which he had assumed.

A second paper was therefore drawn by the consent of all, which he executed, limiting his rights and responsibilities. It was in the same language as the first, except the clause which bound the subscribers to take and pay for the remaining shares, and it declared that the rights and liabilities of the subscribers to it should be as determined by that, and the paper signed by Merceles, Bell, and others.

The associates sold lots to the amount of \$63,724.53, which was received by Van Winkle, and on the 1st day of November, 1867, Van Winkle, at their request, conveyed the part of the farm which was still unsold to "The Riverside Land Improvement Company" for \$84,500, and took from the company a mortgage for \$22,000, the amount of the purchase money yet due to him.

The Riverside Land Improvement Company was a corporation formed by and composed of the associates in the purchase from Van Winkle. Since the purchase, Jacob Merceles and James Bell had each transferred one-half share to Daniel H. Winfield.

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The agreement was that the lands should be conveyed to this land company for its stock, being twelve hundred and fifty shares nominally of \$50 each, and that this stock should be divided among the associates according to their interests in the property conveyed.

The counsel of the company undertook to adjust the division of this stock among the associates. He considered that the four and a half shares not otherwise taken, belonged to the persons who subscribed the first agreement for the division of the shares of the Van Winkle farm, and gave to each half share of the seven and a half shares of the subscribers to that paper, one-fifteenth of the four and a half shares not otherwise taken.

On this assumption he apportioned one hundred and sixty shares of the land company's stock to Cornelius Van Winkle, to James Bell, and to John I. Goetschins, and to Jacob Merceles in his own right, and to him as trustee of Mrs. Hewson—each of these owning one share of the association. To Francis Scott, who owned one and a half shares, he apportioned two hundred and forty shares of this stock, and to the complainant as owner of a half share of the association he apportioned fifty shares of the company's stock. Each of the persons at the organization of the new corporation subscribed for the number of shares so apportioned to him.

The complainant insists that this apportionment was unjust, and that he is entitled to have a greater number of shares of the new company. He insists that the other seven subscribers were not entitled to the four and a half shares not taken, but that he is entitled to his proportion of them. And that if they were entitled to them they were bound to pay for them out of their own funds, and were not entitled to have them delivered to them paid for out of the funds of the first association.

The original agreement of Van Winkle standing by itself, would have entitled Douglas to one-sixth of the whole farm. But if, at the time, there was an understanding that he was to

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have and to be liable for only one-twenty-fifth of it, and this was acted upon in the payment of the shares, that in equity would have protected him, as between the purchasers, from his liability beyond that amount. And when that agreement was reduced to writing and signed by all the parties, it clearly, as between themselves, fixed their rights and liabilities. Of the effect of these papers there can be no doubt. They are drawn with clearness and precision. They entitle each one of the parties to the share of the property for which he subscribed, and made him liable for that proportion of losses and liabilities. The subscribers to the first paper became bound to take and to pay for the four and a half shares not taken, in the same way as they were bound to pay for the share attached to their names; and, on the other hand, they were entitled to have these shares. Douglas, by signing the second paper, was liable only for his half share. His being liable for or entitled to nothing beyond this half share, does not depend merely on his refusing to sign the first document, but on the closing words of the paper that he signed, which state that his interest and liability shall be in the ratio determined and settled by that paper and the paper signed by the other associates. Douglas so understood it. The bait of the profits was held out by the others, but Douglas did not believe in any profits; he had lost confidence in the speculation, and, like a prudent man, was not willing to make himself liable for more than he was already liable for. He rightly apprehended what the others did not see, that if the scheme was a failure he would be liable for losses in proportion to his interest. I can see no fraud practiced on him by the others. He was, perhaps, over-cautious: at all events, as it turned out, those that had faith in it were right. But one cannot protect himself by his over-cautiousness, and then ask for a share of the profits of his less prudent associates, who chose to run the risk and who have made the profits. I am of opinion that the complainant is not, by the agreement, entitled to any part of these four and a half shares in the original association.

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But the associates who signed the first agreement were by it clearly bound to pay for the four and a half shares out of their own funds. The agreement is clear and explicit to that effect; it could not well be more so. The agreement of Van Winkle to sell was no part of that agreement; it cannot be held to qualify or alter it. On the other hand this agreement made after the other, if there is any difference, must be held to qualify and alter the first agreement. The stipulation of each one to take and pay for his proportion of the remaining shares, would, if the association were to pay for them, be of no use—mere verbiage and nonsense. If the association paid for them out of the proceeds of sales, the subscriber could not and would not pay for them, and the whole clause would be an agreement to accept as a gift these valuable shares after the associates had paid for them. This construction is too absurd to be entertained, especially as it is against the clear words of the agreement. Van Winkle could not demand the principal of the fund of these shares until it was raised by sales. But when it was raised by sales, the price of these four and a half shares should have been taken out of the share of the proceeds of sales belonging to the owners of these shares, and charged to them. It was not so charged. The amount that should have been so charged is \$45,000, the value of these shares. But as the one-half of the price of each share, including that of Douglas, has been paid out of the sales without being charged, the wrong done to Douglas was only to one-half of that amount, or \$22,500, and as his interest in the whole scheme was one-twenty-fifth, the individual loss to him was \$900, or the one-twenty-fifth of \$22,500. The owners of the seven and a half shares for the same reason received \$900 more of the property when sold to the company, than they were entitled to. This \$900 represents eighteen shares at \$50 each. If we deduct the mortgage of \$22,000 from \$84,500, the price at which the property was conveyed, the same result will be arrived at; the \$62,500 left will give twelve hundred and fifty shares of \$50 each, of

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which the complainant was entitled to fifty by virtue of his owning one-twenty-fifth, and to eighteen by his claim of \$900.

If an account is taken of the interest on the four and a half shares not paid by the owners, I think that the claim of the complainant to more than eighteen shares of the stock of the Riverside Land Improvement Company will be shown.

It must be referred to a master to take an account on the principles above declared, of the amount due from the defendants, Merceles, Bell, Scott, Goetschins, Winfield, Hewson, and Van Winkle, for the interest on one-half of the value of the four and a half shares at \$10,000 each, which, added to \$22,500, is the amount of which one-twenty-fifth must be charged to them, and for which the complainant is entitled to a decree in the stock of the company at its real market value at the time of the conveyance; and it must be referred to the master to ascertain and report that value.

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1. If a husband who has ample means takes his wife, with whom he has for years been living in a city in discord and bitter contest, to a retired country tavern, against her wishes and protest, and, in her absence, leaves the place, with all his baggage, without notice to or knowledge by her of the place to which he has gone, and without any notice by him to her whether he has made provision there or elsewhere for her support, and leaves her thus without money and without any one in the house or its vicinity, for companions, except the tavern-keeper and his wife, it is such abandonment and separation as, if without justifiable cause, will entitle her to a decree for support and maintenance.

2. A wife is bound to accompany her husband to such place as he may, as head of the family, in good faith determine to remove to for habitation or business, provided it does not unreasonably banish her from all society and comforts of civilized life. But a husband has no right, as a punishment for contumacy or bad temper, to banish his wife to a lonely place, without friends or society or her accustomed comforts, when he does not stay with her and share her privations.

3. By law, a man is not justified in deserting his wife because she is extravagant or lazy, or swears, or uses coarse language, or is sickly, fretful

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or of violent temper, or because she wreaks her temper or showers her coarse or profane language upon him, and thus makes his life uncomfortable. These are not crimes, but infirmities and defects, which, in consideration of law, a husband undertakes to put up with when he takes his wife for better or worse.

Argued upon final hearing, on pleadings and proofs.

Mr. W. B. Williams, for complainant.

Mr. Gilchrist, Attorney-General, and *Mr. McGill*, for defendant.

THE CHANCELLOR.

This suit is by Mrs. Boyce against her husband, for support and maintenance, on the ground that he has separated himself from her, and neglected to maintain and provide for her. It is founded on the tenth section of the divorce act, which declares "that in case a husband, without any justifiable cause, shall abandon his wife, or separate himself from her, and refuse or neglect to maintain and provide for her, it shall and may be lawful for the Court of Chancery to decree and order suitable support and maintenance to be paid and provided by the said husband."

The chief, if not the only question, is whether Mr. Boyce, without justifiable cause, has abandoned his wife, or separated himself from her, and refused or neglected to provide for her maintenance. This is the real issue. A vast amount of testimony has been taken on both sides, relating to the conduct of the parties during their married life, most of which bears only indirectly, if at all, upon this issue.

Mr. Boyce, a widower fifty-six years of age, was married to the complainant, a single woman of twenty-six, October 13th, 1857. He was worth over \$30,000, and engaged in business in New York as a chair-maker, and resided in a comfortable and well-furnished two-story house in Jersey City. The complainant was the daughter of a farmer of very moderate means, residing at Branchville, in Somerset county. Mr. Boyce had a daughter Louisa, then nine years

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old, residing in his family. His son Isaac was married, and lived on Staten Island. Another daughter, Mrs. Van Dyke, had died at his house a few months previous, leaving a son of tender years. His first wife died some ten months before this marriage. The complainant, at the request of Mr. Van Dyke, the defendant's son-in-law, who was her cousin, and resided with Mr. Boyce, stayed at the house of Mr. Boyce as a companion for Mrs. Van Dyke during her last illness, and until her death.

After the marriage, Mr. Boyce took her to his house in Jersey City. They had one child, born in July, 1859, which died March 4th, 1861. He relinquished his business as a chair-maker, in February, 1860, on account of ill health. He broke up housekeeping April 29th, 1864, selling out his furniture and renting the house. They stayed in Jersey City until May 18th of that year, when they went to board at a place called Rockland Lake, or Slaughter's Landing, on the shore of the Hudson river below the Palisades, at the place where the Rockland Ice Company let down their ice from the ice-houses on Rockland Lake, which is on the top of the hill, and from which they ship it to New York. Here they stayed until Monday, June 27th, when Mr. Boyce, during the absence of his wife on a visit to Jersey City, left the house, with his trunk, and went to Manhasset, on Long Island, where he stayed until October. He did not let Mrs. Boyce know that he intended to leave, or ask her to accompany him, or let her know, at any time, where he had gone. The question is whether this, under the circumstances under which it took place, was a separation of himself from her without justifiable cause, and without providing for her maintenance.

The acts that constitute the alleged separation or abandonment took place within a few days. But the relation of the parties to each other at that time is important as giving character to these acts, and makes it necessary to consider their conduct to each other, and the history of their married life, for that purpose. That life had been, for a large part of it,

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filled with unhappy difficulties, bitter quarrels and recriminations, accompanied with some personal violence on both sides. Mrs. Boyce had a quick and violent temper, which, if it was not uncontrollable, she did not control; she indulged in much violent, and even coarse abuse of her husband, which was not justified by hardly any provocation. She exercised with severity her peculiar power of vexing and tantalizing him; I think more so than was justified by retaliation or self-defence. A more rational and prudent course of conduct towards him, if all his alleged faults are real, would probably have made her life with him more happy, and might have averted the issue of which she now complains.

This conduct on her part does not appear during the first year of their married life, and was not exhibited to any great degree until after the death of their child. While they were at housekeeping, Mrs. Boyce appears to have discharged the duties of a wife, in the household affairs, faithfully and well. She treated his daughter with great attention and kindness, so that she became devotedly attached to her, and she is accused by her husband of stealing his child's affections from him.

On the other hand, Mr. Boyce treated his wife, from the commencement of their union, unkindly, and in several instances with great want of feeling, and with harshness and cruelty. I do not refer to physical violence; the instances of that, which are proved, are comparatively insignificant. By this observation, I do not mean to concur in the opinion which he testifies was given him by some one that he calls his counsel, that he was entitled to chastise her much more severely than he did—an opinion which I am sure no counselor of this court would ever degrade himself by giving. In a state so far in advance as to prohibit, absolutely, a teacher from inflicting corporal punishment upon a scholar in any school, such a relic of barbarism as the right of a husband to chastise his wife, for any cause, can have no existence.

One of the instances of cruel treatment that I refer to, was on the eve and day of their marriage. The facts are testified

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to by her, but they are not contradicted. They were not introduced on her part, but were drawn out by a harsh question put to her on his part.

They were to be married at nine o'clock in the morning, and to have taken a wedding tour ; he was to have brought her, as bridal presents, a gold ring and a gold watch. On the evening before the marriage day, he came to her father's house where they were to be married, and, upon her speaking of her trunk being packed, expressed surprise, and said that they were not to go on a wedding journey, and alleged as his excuse, the tightness of the money market, consequent on the well known panic of 1859 ; he brought neither ring nor watch. He had met with no loss, and had money in the banks and in his pocket. His excuse was evidently a pretence and evasion. This to her must have been a great disappointment and mortification. She was the daughter of a plain farmer, but evidently superior in many respects to most of her class, and to the man she was about to marry ; and she had, no doubt, looked forward to these promised gratifications and others which his wealth could afford, as compensation for marrying one so much older than herself. Here his promises and wealth both failed her. He was both faithless and unfeeling. It was the first exhibition of the parsimony and meanness that were the burden of her reproaches.

Next morning, when she asked how he felt, he said, not well ; he had not slept ; he had been thinking about their conversation last night, and wondering whether they would be happy. This to the woman who was in two hours to be his wife, was more than unfeeling, it was harsh and cruel ; it brought tears. Upon her saying she ought not after that to marry him, he asked her forgiveness, and protested it would make him the most miserable of men. She forgave this, and married him. It was hardly possible for her to forget it. The breach of faith may have been caused, if it was not excused, by his economical spirit ; but the scene in the morning appears like a contrived heartless and cruel stab.

Again, her child died from some injury by falling off a

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lounge, where she had placed it. Afterwards, he told her and others, in her presence, that she had laid the child on the lounge purposely, that it might fall off and be killed. This to a mother grieving for the loss of her child, and who would reproach herself and feel miserable because she had placed the child in peril, whether there was any negligence in it or not, was a most unfeeling, malignant, and cruel accusation. No personal violence of which he was accused, approaches it in cruelty. It is shown by two witnesses; he nowhere contradicts it.

He ordered her sister, from a distant town, who was visiting her, to leave his house, and attempted to seize her and put her out. He ordered a friend of hers from Trenton, whom he had visited in company with his wife, when she was visiting his wife, to leave his house, and when his wife opposed it, brought a policeman, and when he refused to put her out, brought another with some warrant for the purpose.

He called her a fat, lazy thing, and spreading out his dressing-gown walked up and down the room, mimicking her gait in the presence of her servant.

In August, 1863, he published in the city papers a notice, warning every one to trust no one on his account, and explained to her and merchants with whom she dealt, that it was intended for her. This was wanton, as it does not appear that she had ever contracted any debt of consequence, without his approval and consent.

His conduct in expelling her from his bed, because she staid out on one night until after ten o'clock, and disturbed his sleep by coming to bed at that time, was harsh and unjustifiable. His conduct in not allowing her, after 1860, to purchase the family stores, in dealing out money to her in parcels of ten, twenty-five, and fifty cents, and requiring her then to tell what it was to be expended for, was neither unlawful or cruel, but it was calculated to provoke, though it did not justify many of the epithets which she is said to have bestowed on him; and his whole treatment and conduct was calculated

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irritate and provoke a quick and uncontrolled temper to such outbreaks as she indulged in. But it by no means justified them. It is not necessary here to express an opinion to which of these parties was to be most blamed for these unhappy discords. The fact that his daughter, who was sixteen years of age at the separation, and who saw the conduct of each to the other, constantly and intimately until then, firmly took sides with her stepmother against her father, throws more light on this question than can be derived from evidence so contradictory as much of this is. Her letters, written during the last three months, show with certainty what her opinion then was, and she must have had more obliquity of moral perception and deficiency of natural affection than I can conceive possible in her case, if the conduct of Mrs. Boyce was such as her husband and his witnesses state, and unless her father's conduct had been strongly marked by harshness and ill-treatment.

With this light as to the relations of the parties, we can better consider the facts which constitute the separation.

It is shown that before he left Rockland Lake, Mr. Boyce desired a separation. He asked her father, a year before this, to take her home, and offered to pay him anything he should ask for her board. He told Mrs. McLaughlin, before they left Jersey City, that he was determined to separate. He told Mrs. Plum, that he wanted her to take \$400 a year, and live separate. He offered her this in Mrs. Plum's presence. After they went to Rockland Lake he got Mrs. Ward to offer her \$500 a year to separate. He told several that he could not live with her, could not get along happily with her, and that it was his reason for breaking up housekeeping. He advertised his furniture for sale, and offered his house to let without consulting her, without her consent, and without her knowledge, until a few days before the sale. The house was on Friday, the 27th of April; the only bed left in the house that night was his own, from which she had been expelled eight months before. He provided no place for her Louisa to sleep, but told them, when asked, to go where

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they pleased. He provided no place for her until Sunday. He had determined to go to Ackerson's, at Rockland Lake. He never consulted her about the place where they were to go, and she insists that he did not tell her where he was going until two or three hours before they started to go there, on May 18th. He insists that he told her before the sale of the furniture. The evidence is very conflicting, some of the witnesses are, at least, very much mistaken. The weight, if estimated by the number of witnesses, is on the side of Mr. Boyce; but notwithstanding this, I am much inclined to turn to the letter of Louisa, of May 17th, rather than to Louisa's recollection, or that of other witnesses. The explanation of that letter can satisfy no one, and I do not believe that she could, at that time, have contrived this letter if she had known where her father was going to, before she left Jersey City on the 14th of May. But this point is not of any vital importance. The evidence is abundant to show that Mr. Boyce intended to take his wife to a place that he chose, without consulting her wishes, or asking her assent, which is the only object to be attained by this proof.

When Mrs. Boyce arrived at the tavern kept by Ackerson she was dissatisfied, and protested against staying there; her husband persisted. The house was on the shore of the Hudson, below the hill or rocks, here more than one hundred feet high; the shore was without cultivation, grass, or herbage; there was no other dwelling-house below the hill: on one side was a yard for building boats, on the other a range of sheds and a pig pen; the shore was about four hundred feet from the river to the hill; in front a pier, to which the company's ice boats came for their cargo. The tavern was a two story frame building. When they arrived there were no boarders but the workmen in the boat-yard, who took their meals there. Mrs. Ackerson did all her own work, and had no servant; but one was got soon afterwards. The rooms were small, illy lighted, and poorly furnished. It was, in fact, a forlorn, desolate place, on the west shore of the Hudson, below the rocks, without a single habitation on

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that side in sight. It was a place where no one would resort or stay, except amateur fishermen or boatmen, or persons whose straitened circumstances would compel them to put up there. The whole aspect of the place was such that no one can doubt, in the relation of these parties, that Mr. Boyce brought his wife there to mortify and humble her, whether he told her so or not. That he did, she asserts and he denies.

While they continued at Ackerson's their conduct towards each other seems, in the main, to have been comparatively amicable. They went several times to Jersey City, and he made arrangements with Mrs. Ward, residing there, for the complainant to stay at her house when she came to Jersey City. He procured or paid for some clothing for her. They had a number of disputes and quarrels, in one of which personal violence was used; for this she had him arrested, tried, and fined.

On Thursday, the 23d of June, Mrs. Boyce wanted to go to Jersey City. She says, he had promised her that she should go on that day. When the day arrived he opposed it, and told her not to go, but to wait until Monday and go with him. He refused to give her money to pay her expenses, and before the boat arrived, in which she must go if she went, he walked out of the way. She borrowed a dollar from Mary Caton, the servant, and went. She had told Mr. Boyce, as she says, that she would be back on Saturday, or if not, she would see him on Monday, when he came down. She did not return on Saturday.

On Monday morning, June 27th, Mr. Boyce left Ackerson's for New York. He took with him all his clothing and other goods, packed in his trunk, except an old hat and an empty cigar box, which he left in his room, and one shirt and some small articles which were being washed, and which he requested Mr. Ackerson to bring to him at New York. He did not tell any one where he was going, or when he would return. He left no word or message for his wife on her return. His trunk was taken to some place in New York,

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to which, sometime that week, Mr. Ackerson brought his shirt and some other small articles. On the same day, or the next day at farthest, as I am satisfied from the evidence, he went to Manhasset, Long Island, and engaged board for himself, of B. H. Smith, a farmer living there. He engaged board there for himself alone; never mentioned his wife to Mr. Smith, who did not know that he had a wife. He returned to New York on Friday, July 1st, and staid there, or about the city, until July 5th, when he went back to Smith's, where he continued to board until some time in October. When he left Ackerson's he knew that his wife's clothing and her trunks were there, and that she expected to return. He paid for her board and his own up to that morning. He paid to Mary Caton the borrowed dollar, and never came back there himself to board, and never sent any note, message, or directions to his wife as to where she was to stay, or informing her that he had made any provision for her.'

Mrs. Boyce returned to Ackerson's on the morning of Wednesday, July 29th. She says, that not seeing him at Mrs. Ward's on Monday, she called, on Tuesday morning, on the captain of the steamboat, who informed her that her husband came down with him on Monday, and said that he did not intend to return to Rockland Lake. She went to Ackerson's on Wednesday, and on arriving inquired of Mrs. Ackerson for her husband. Mrs. Ackerson told her that he had left, bag and baggage. On inquiring if he had left any word for her, she was told he had not. Mrs. Ackerson went to the bar-room to her husband, and returned with the answer, that Boyce had left no word for her with him. This is the statement of that occurrence, as stated by Mrs. Boyce and Mary Caton, who was present. Mrs. Ackerson states it differently, in some respects, but her statement is not so clear or consistent, and I prefer to rely on that of Mary Caton and the complainant. After all, the main difference is, as to the words, bag and baggage, which are not very material, as he had left with his trunk and all his effects. That he left no

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message for her is beyond question, as he himself testifies positively, that he did not.

She stayed there that night, packed her clothes in her trunks, and went to New York the next morning. Some days afterwards, having borrowed some money, she went for her trunks. The next morning, as Ackerson and his wife were carrying down her trunks (they had, in the meantime, charged their servant), she offered to pay him her bill. He told her there was nothing to pay, that Mr. Boyce had provided for the payment. Upon this she said that she would not then take away her trunks. Ackerson then told her, that Mr. Boyce said he would pay for her board as long as she stayed there. She left her trunks, went back to the room, and, in a few days, returned with a female friend, who stayed there with her that night. The room formerly occupied by her was then occupied by a stranger and his wife, and Mrs. Boyce and her friend slept in another room. The next morning she left with her trunks. Up to that time she was not informed, nor did she know, where Mr. Boyce was. The Ackersons did not inform her, nor did they know where he was. Mr. Boyce did not communicate with her in any way, until after she had taken board at Mrs. Henry's, in Jersey City. He refused to pay her board there, and to pay for clothing which she bought of merchants in Jersey City. The evidence as to some of these facts, is somewhat contradictory, but on careful consideration of it, I have been brought to the above conclusion as to the facts.

From these facts the conclusion is inevitable, that the defendant did separate himself, and intended to separate himself, from his wife. That when he left he intended not to come back to her, or to that place, and that his manner of leaving, in her absence, without advising her of his intentions, and concealing from her and the Ackersons the place to which he had gone, was designed to produce the impression on her that he had abandoned her, and to influence her conduct. He had before, expelled her from his bed; had, against her will, broken up housekeeping; and had taken her, without

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consulting her, and without her consent, to a place disagreeable of itself, such as he knew must be repulsive and intolerable to her. He then privily deserted her, leaving her with no companion, or any one within reach suitable for companionship, at an ordinary country tavern, with no money to pay her board, and no assurance from any one, that her board was provided for until her second return from New York. These facts constitute a separation from his wife, and an abandonment of her. He did this without providing for her maintenance and support. The arrangement he made with Ackerson was not such provision as satisfies the statute.

The wife is bound to follow her husband when he changes his residence, even without her consent, provided the change is made by him in the *bona fide* exercise of his power, as head of the family, of determining what is the best for it. Even this may have its limits, and it may be questioned, whether a husband has a right to require his wife to leave all her kindred and friends, and follow him to Greenland or Africa, or even to Texas, Utah, or Arizona. Clearly, he has no right to take her to such places as a punishment for her disobedience, extravagance, or ungovernable temper. No husband has the right to take his wife to any such place where he does not intend to reside with her himself, and compel her to stay there at his pleasure, alone without him. Else he might take a wife who had offended him, from a comfortable or luxurious home among the most cultivated inhabitants of the state, to a hut in the pines of West Jersey, among charcoal burners, fishermen, and furnacemen, and by placing her in a comfortable log cabin, in a pure, healthy atmosphere, with wholesome, well-cooked, nutritious food, while he himself went to Saratoga or Niagara, or returned to his luxurious home, and be held to have complied with the law by thus providing for her support. The defendant had no right to annex, as a condition to the provision for the support of his wife, that she should stay without him or any companion, at a place like Ackerson's tavern. Besides, if it had been a

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per place, the mere provision for board and lodging is not efficient provision. She had no money at her command to employ a physician, to send for medicine, or to get away from this place to her relatives, if they should be sick or dying, or to go anywhere for the necessaries of life, or for any society or enjoyment.

There is no justifiable cause for the abandonment shown. We will not consider whether her ungoverned temper, her frequent outbursts of passion, the abusive and scurrilous epigrams bestowed on him, and her perseverance in tantalizing him, were not occasioned or justified by his harsh treatment of her in the instances before mentioned, and others. But if they were not provoked by him, they are not crimes, but the infirmities and defects which, in consideration of law, a husband undertakes to put up with when he takes his wife for better or worse. In morals, it may be different. A man may not desert his wife because she is extravagant, or lazy, or quarrelsome, or uses coarse language, or is sickly, fretful, or of violent temper; or because she wreaks her temper, or showers coarse or profane language upon him, and thus makes his life uncomfortable. Incompatibility of temper has not as yet, in New Jersey, been made by law a ground of divorce or for desertion.

In my opinion, the evidence shows that the defendant has, without justifiable cause, separated himself from his wife, and neglected to maintain and provide for her; and a decree should be made for a suitable support, to be paid and provided by the defendant for her. To enable the court to determine what is a proper amount to be paid for that purpose, it should be referred to a master, to ascertain and report what is the amount of the defendant's estate, and of his income from it and all other sources.

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BELDEN vs. BELDEN.

Where the children and devisees of a testator executed a written agreement to divide all his property equally, although his will gave to his three sons a valuable lot, and divided the residue of his estate equally between his sons and daughters, and one of the sons at the signing of such agreement execute to the other sons a deed for his share in that lot, with the verbal understanding that it was for the purpose of enabling them to carry out the agreement of equalization, no implied promise arises that these grantees will pay to him the amount specified in the deed as the consideration of the conveyance. The circumstances negative such implication.

Argued upon proofs and the pleadings in the cause.

Mr. M. P. Grey, for J. C. Belden.

Mr. P. L. Voorhees, for defendant O. S. Belden.

THE CHANCELLOR.

The question arises between the parties to a suit in partition, as to their respective interest in one of the parcels of land sold by virtue of the order for sale. The parties were children of Calvin Belden, of Salem, who died in May, 1864.

Calvin Belden, by his will, devised a store lot in Salem to his three sons—John, David, and Oliver—subject to a mortgage of \$1800, and an annuity of \$400 to his widow. The residue of his property he divided equally among his three sons and three daughters.

After his death, on the 20th of February, 1867, his children entered into an agreement for doing away the preference given in the will to his sons, and for equalizing the division of his property among his six children. His sons, John and David, who were the acting executors, undertook to carry out the agreement, and Oliver, to enable them to do so, at the time of signing the equalization agreement, executed and

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ivered to them a deed for his interest in the store lot. The sideration expressed was \$3000.

Oliver claims that this \$3000 was to have been paid to 1 above his equal one-sixth of the property, and this is the y question in the cause.

The value of the store lot was \$16,000. The mortgage interest were \$2000, and the value of the annuity was ut \$2000, leaving the net value of the store lot \$12,000, \$2000 to each child. If the claim of Oliver is allowed, 1 child having received besides his or her equal share of rest of the testator's estate \$2000 of the value of the e lot, David and John each paying \$1500 to Oliver, will e only \$500 each out of the store lot, and Oliver will e received \$5000 out of it, the daughters receiving \$2000 1. By the will each son would have received \$4000. 2 values here assumed are about the true values, but if 3 erent values are assumed the result will be proportionally ut the same; a result widely different from the equali- on of division which was the object of the agreement. It 4 mportant to keep this result in view in construing the eements and releases in this case, which are not drawn 5 h much skill, and may on their face possibly permit of 6 constructions.

The agreement of equalization, after stating the preferen- devise of the store lot to the three sons, stated that the 7 dren of testator "have decided upon dividing the re- 8 uary estate of their said parent in a different manner than 9 t as set forth in the said will, intending thereby to equalize 10 ir respective shares of said estate as nearly as practicable;" 11 1 then provides that the acting executors do state an account 12 all the debts and liabilities of the deceased, and of the assets, 13 1 of the moneys paid out by them, and also of the moneys 14 1 assets received and unexpended in their hands, and a valu- 15 on of all the real and personal estate unsold, including the 16 re lot, clear of the encumbrances created by the will. If 17 2 children approved of such statement and valuation the 18 ing executors, John and David, were to take the property

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at that valuation, and to assume and discharge all the debts and liabilities of the deceased ; and the residue of the estate, after the discharge of all claims, was to be divided into six equal shares, each child to have one share. And each of the parties agreed to sign and execute all necessary instruments, in writing, *conveyances* and transfers, to facilitate and complete without delay that agreement.

The only conveyance necessary to enable the executors to carry out that agreement, was a deed from Oliver to them of his one-third of the store lot. That deed was executed and delivered at the same time with this agreement, and the two instruments must therefore be considered and construed as part of the same transaction ; and both must be considered as part of the equalization of the distribution of the estate of the testator among his six children. The agreement clearly states that such was its object, and this is shown by the parol testimony. The operative words of the agreement in conformity with the recited object, expressly provide that the whole residue, after the payment of debts and liabilities, shall be equally divided among the six children. This is entirely inconsistent with a preference of \$3000 to Oliver out of the shares of his two brothers, and with the very unequal and unjust result that would follow.

The criticism on the words in the recital, that it was "the residuary estate" that was to be divided differently, amounts to nothing. The words may refer to the residue after special legacies and devises are taken out, as it is used in the will, or the residue after payment of debts and expenses, as it is used in the operative part of this agreement. It is not used in the first meaning, because this very sentence says that the object is to provide for its distribution in a different manner from that set forth in the will, by equalizing the shares. As the will equalized the shares in the residue over special gifts, the only meaning that can be given here is the residue after debts and expenses. The provision that the title to the store lot should not be affected by the agreement is clearly unnecessary, but can have no effect upon the agreement.

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There can be no doubt as to the effect and construction of these two instruments—the deed and the agreement. But Oliver contends that there was an agreement by David and John to pay him \$3000 for this conveyance, and that he will be allowed to prove this and the fact that it is unpaid, notwithstanding the receipt on the deed; and that as unpaid release money it was a lien upon the premises and upon the proceeds of the sale now in this court.

A vendor will be allowed to prove the purchase money paid, notwithstanding the receipt on the deed, and has a lien upon the premises sold for unpaid purchase money, which would follow the proceeds when paid into court. But such receipt must be contradicted by proof that is clear and convincing. In this case the only proof is that of Oliver S. Belden himself. He is contradicted by his brother John, who has survived David. It is not claimed by John that the money was paid, but that the deed was delivered to carry out the agreement into which Oliver entered with the others and afterwards confirmed by receiving his share. The recital of a consideration in a deed is no proof that that was intended to be paid. And the mere proof that no money was paid at the delivery of such deed would not sustain an action for the consideration recited. Oliver's own testimony, and the fact that he accepted at the time the same sum as was paid to his sisters in a bond given to him by David and John, affords a strong presumption that this \$3000 was not to be paid in addition to that, as it would then have naturally been included in that bond.

Besides John Belden, three other witnesses present at the execution of the deed, state positively that it was given for the purpose of carrying out the agreement of equalization.

One witness, especially when he is the party in interest, cannot be allowed to overcome the recitals in two instruments executed by himself under seal, when contradicted by so many others. The other facts and circumstances in the case, the submission and award, and the two releases executed by

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Oliver, confirm strongly, if not conclusively, this view of the case, and need not be further considered.

The claim of Oliver S. Belden must be overruled and disallowed, with the costs occasioned by it.

HAGUE and YOSS vs. THE INHABITANTS OF WEST HOBOKEN and DOWD.

1. If a purchaser of a tract of land subject to a mortgage given by him for the consideration money, lays out the same in blocks and streets, and sells lots by reference to the map by which it is laid out, and thus dedicates these streets to public use, as against himself, upon a foreclosure sale made under the mortgage, in a suit where such purchaser is a party, the dedication is made void. The purchaser buys free from it.

2. If, after the streets have been opened and used by the public, the mortgagee releases to the mortgagor a block, with its appurtenances, referring to the map, one who had purchased a lot in said block and on such street, and by such purchase had acquired the title of the mortgagor to the middle of the street, or a right of way over it, this release discharges not only the lot, but the half of the street, or the right of way to which the purchaser acquired title, from the lien of the mortgage, and the subsequent foreclosure sale does not affect the title to such street or right of way.

3. The rights that others have acquired, by dedication, from the mortgagor over this street or right of way so released, are not affected by the mortgage sale if not made parties to it.

4. The purchaser of such lot, with the right of way appurtenant, will not, as against the public, be allowed to enclose the land in front of his lot so dedicated, by virtue of a deed given to him by the purchaser at the foreclosure sale for that purpose.

This cause was argued on final hearing, upon the pleadings and proofs.

Mr. Winfield, for complainants.

Mr. J. B. Vredenburg, for defendants.

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THE CHANCELLOR.

The complainants seek to restrain the township and its contractor from opening Clinton street to the width of seventy-five feet, by which the court yards in front of these dwellings, including the whole front of the block between Paterson street and Hoboken street, would be thrown into the street to the depth of twenty-five feet. The question is whether this strip of twenty-five feet is dedicated to the public, so that the township authority have the right to take it without compensation.

Browning, who laid out the village of West Hoboken, bought the tract on which the premises in question are situate, of Traphagen, on the 1st of December, 1835, and gave back a mortgage for part of the consideration, which was foreclosed, and the property conveyed back to Traphagen by the sheriff on the foreclosure sale, by deed dated April 8th, 1841. Browning, by a map made in 1836, and filed in the county clerk's office on the 9th day of May, 1837, laid out this tract together with several other and much larger tracts which he had bought, into blocks, lots, and streets. On the 20th day of September, 1836, Browning conveyed to the complainant Hague, four lots on Clinton avenue and three lots on Paterson avenue on this map, being in block No. 2, and annexed to the deed a diagram of block No. 2 with its division into lots, and the adjoining streets, in which Clinton avenue is called Broad avenue, seventy-five feet wide. Browning, on the 23d of September, 1836, conveyed to Maycock, (through whom the complainant, Yoss, derives title,) four lots in block 2, fronting on Clinton avenue, being the residue of the front of block 2, and annexed to the deed a like diagram. On the 21st of November, 1836, Traphagen released to Browning the block No. 2 on the map, being twenty-eight lots as laid down on the map, from the lien and operation of the mortgage.

Browning, in 1837, conveyed lots laid down on this map to purchasers, and in that year conveyed to Ulysses Savoye

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fourteen lots, being the north half of block No. 10 on the map. These lots were not part of the tract conveyed by Traphagen, nor included in the mortgage to him, but were part of a tract purchased of Van Winkle.

The decree for the foreclosure sale and the sheriff's deed both excepted the twenty-eight lots in block 2, released by Traphagen. After the sheriff's deed to him on the 6th day of May, 1843, Traphagen, by two deeds, conveyed to Hague and Maycock respectively, a strip of twenty-five feet on Clinton avenue next adjoining their lots, which is the strip in question in this case.

The making and filing this map and selling lots by reference to it, is a dedication of the streets laid out to the public, so far as Browning, or title derived from him, is concerned. Acceptance by the proper public authority is also necessary, in order to make the public liable for maintaining the streets in good order. But the proper authorities may accept the dedication at any time afterwards. *Trustees v. Hoboken*, 4 Vroom 13.

The township being the municipal authority charged with the repair and opening of streets and highways, have, through their proper officers, directed this street to be opened and widened to its original width, and employed the defendant, Dowd, to make the improvement. The township is the proper authority to accept this dedication, and its direction to open and improve the street is an acceptance of it.

When Browning conveyed to Hague and Maycock, in 1837, the map had been made laying out Clinton avenue seventy-five feet wide. It was actually opened as a street and used as such by the public before the conveyance to them, and remained open and used as such to the width of seventy-five feet, designated by fences on each side from Paterson street below block No. 2 for several blocks above and north of it, until 1843, when the strip of twenty-five feet in front of this block was enclosed. Clinton avenue then, at the time of this purchase, and for six years afterwards, was a public

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for every purpose, except burdening the township with **ing** it in repair. It is a settled principle that a conveyance **nd** bounded on a street conveys the fee to the middle of **treet**, and these deeds by Browning thus conveyed the **o** the middle of the street; and without this principle **created** and granted the right or easement annexed to **lots**, of using Clinton avenue as a way for access to the **ic** highways in the vicinity. When Traphagen released **lots** with the appurtenances from the lien of his mortgage, he released also the land to the middle of the street **passed** with his deed, and also the right of way over the **cated** street that was appurtenant to the lot. This is not

the legal effect of the release, but must have been so **erstood** and intended by Traphagen, for the release refers **ie** map and describes the lots released by the numbers **down** on the map, and recites that these lots had been **veyed** to Hague and Maycock; and it would have been **ttle** use to them to release the lots, if the mortgagee could **shut** up the street by which access was had to them. **a** release by a mortgagee of lots described by a reference **map** on which streets are laid out, must be held by the **e** rule as a conveyance by the owner of the fee, to convey **land** to the middle of the street.

hen this strip being released from the mortgage by Traphagen, did not pass to him by the sheriff's deed, and he **d** give no title to it by his deeds of May 6th, 1843. **ue** and Maycock held the title to these lots by the **con-**tinuance of Browning and the release of Traphagen in 1837.

deeds by Browning conveyed this strip, subject to the **cation** by his map and conveyances thereby. Others **des** Maycock and Hague had bought lots on this released **k**, and Ulysses Savoye, as appears by the proof in 1837, **ght** fourteen lots—the north half of block No. 10 on **map**—which is one block west and two blocks north of **2**. Block No. 10 is not on the Traphagen tract, but on **act** conveyed to Browning by Van Winkle, and therefore **s** its appurtenances were not affected by the foreclosure.

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No dedication by Browning could affect Traphagen's mortgage, but as to the property which was released from his mortgage it remained impressed with the dedication of Browning in favor of Savoye and the other purchaser from him, for whom the township defendant, as the proper municipal authority, now that it is ready and willing to assume the responsibility, is entitled to call upon the complainants to surrender the strip of land for the object for which it was dedicated—a public highway—and that without any compensation. The title or fee in the land subject to the use of it by the public, will be retained by the complainants.

The bill must be dismissed.

BLACK vs. KEILEY.

1. No relief will be given in equity to aid a deed alleged to convey a good legal title, and prior in date and registry to the deed against which protection is asked for. Such deed is a good defence at law.
2. No relief can be given in favor of a conveyance not proved to exist, and not admitted in the answer.
3. The defendant offered the complainant that if he would purchase the title of a stranger to a lot lying within his premises, he would pay \$100 towards it. The complainant purchased it for \$375. *Held*, that the defendant was bound to pay \$100, with the interest from the purchase, but could not be compelled to pay more.
4. The defendant was bound to pay the price agreed for this title, even if proved not to be a good title.
5. A defendant cannot have any positive relief on his part touching the subject matter of the suit; the only judgment for him is to refuse the relief prayed for by the complainant.

Argued on bill, answer, and proofs, upon final hearing.

Mr. Gummere, for complainant.

Mr. Pitney, for defendant.

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THE CHANCELLOR.

he case, as stated by the bill, is this: That Caroline h, the wife of Thomas Fitch, was seized of a tract of . at Keyport, in Monmouth county, devised to her by mother, to be held and enjoyed as her sole and separate e, free from the control of her said husband, or any re husband, as fully and exclusively as if she were a le woman, with full power to sell, alienate, and dispose ne same by deed or will, as fully and absolutely as if she : a single woman.

hat Caroline Fitch, after her mother's death, in 1855, by deeds, conveyed a lot fifty feet wide by one hundred feet , to Alexander Singer, for \$300. And the bill charges these deeds vested the title to this lot in Singer. That September, 1869, Singer, for \$300, conveyed the lot in o the complainant, by which he became vested with the in fee, which still remains in him.

hat in 1857, Thomas Fitch and Caroline his wife, con- d in fee to H. L. the lands devised to her by her mother, these words after the description of the whole premises etes and bounds, "excepting and reserving from said ises hereby conveyed" (among other things,) "one lot venty-five feet wide and one hundred feet deep, **fronting** he northerly line of Broad street, and on the northerly of said tract sold and conveyed to Singer." That by al mesne conveyances this tract was conveyed by H. L. e defendant, Keiley. In every mesne conveyance the ription of the premises and the exception were in the : words.

at Keiley, after the conveyance by Singer to the com- ant, called on the complainant, and agreed to purchase lot at a price agreed upon, but which is not stated in the

This contract Keiley refused to perform, and has not rmed. That Keiley afterwards procured a quit-claim . from Fitch and wife for the Singer lot, and gives out pretends that the deed to Singer was signed only by . Fitch, and not by her husband, and is void.

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The bill avers that the deed to Singer is valid, and conveyed the title, and that the deed to Keiley from Fitch and wife is void, but nowhere states whether the deed to Singer was signed by Mr. Fitch or not.

The relief prayed for is, 1. That the deed from Fitch and wife to Keiley may be declared void, and that Keiley be decreed to give up the same—to release the premises to the complainant; that he be perpetually enjoined from claiming title under the same, and that the title of the complainant be declared valid: Or, 2. That the defendant be decreed to pay to the complainant \$300, the consideration paid by Singer to Mrs. Fitch for the lot, with interest, and that this amount be declared an encumbrance on this lot by holding the deed of Mrs. Fitch an appointment or charge of it on her separate estate: Or, 3. That the amount of \$300 paid by the complainant for the Singer title may be decreed to be paid by the defendant, and declared a lien upon the property. And lastly, the general prayer for relief.

If the title conveyed to Singer is a good legal title, as is repeatedly alleged in the bill, as it is prior in date and registry to the date of the deed to Keiley, there can be no claim to any relief in equity; it is a complete defence at law. But were this not so, no relief can be had in this suit for its protection, because it does not appear that there ever was such a deed or deeds to Singer. The answer in the third paragraph expressly denies all knowledge of any such deed except from hearsay, and requires the complainant to make proof thereof. And no inference as to the existence of such conveyance can be taken from paragraph twenty-nine, in which he denies that the husband of Mrs. Fitch joined in said supposed conveyance, because he carefully mentions it as a supposed conveyance. This does not waive the call for proof. No such conveyance, or any evidence of its existence, is found among the exhibits or proofs in the case. And no relief can be granted founded on its existence.

There is no proof that Keiley agreed to purchase, for any sum, the title of the complainant to the Singer lot, after the

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complainant had purchased it. But there is proof, and the fact is admitted by the answer, that after Keiley was informed that Singer claimed this lot, which was located very injuriously in the middle of his tract, he urged the complainant to buy in the Singer claim for him; that he claimed that the complainant and the other heirs, and the executor of complainant's father, Job Black, who had sold the tract to Keiley enclosed by fences, neither of the party knowing that this accepted Singer lot laid within the fences, ought, in equity, to buy in that title for him; that Keiley offered, if he would do it, to pay \$100 towards it, and the complainant offered to do it if Keiley would pay half the expense. No agreement was made nearer than these two offers, but in this situation of the negotiation the complainant purchased the Singer title for \$300, and incurred expenses to the amount of \$75 in making the purchase.

I think that this may be deemed a contract to purchase the Singer title of the complainant for \$100. There is no proof of any agreement on the part of Keiley to pay anything more for it. That he afterwards offered \$375 for it, does not constitute a contract to purchase it at that price, as this offer was refused by the complainant. Keiley had a right to withdraw when he found that the complainant did not have the legal title.

But the agreement to pay \$100 for the Singer title he was bound by, even if that title was bad. He and the complainant, alarmed by the report of the Singer title, both agreed to purchase it without examining into its goodness. The complainant acted upon faith of his promise, and paid out his money for this title, and Keiley is bound to repay him to the extent of his agreement. This being the only ground of relief stated in the bill that is sustained by the proof, a decree can be made under the general prayer for relief.

There can be no decree for relief under the general prayer, unless warranted by facts set forth in the bill. The fact that the complainant had acquired the Singer title is stated in the bill, as also the fact that Keiley agreed to purchase it for a

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stated price. No contract in writing is set forth. That is not necessary unless the statute of frauds is pleaded. The answer denies any contract. It is necessary to prove a contract in writing, or one in part performance, so as to be taken out of the statute. The answer can admit one in writing, or one in part performed. The answer here admits the agreement to pay \$100 towards the expense if the Singer title should be purchased, and the evidence shows performance. That the amount of the price to be paid differed from that set forth in the bill, would be no fatal variance; nor does proof of a fixed price create a variance from a contract set forth, without stating the price.

The agreement to pay the complainant \$100 towards buying in the Singer title did not prevent the defendant from buying the legal title wherever he found it to be, or make such purchase a fraud on the complainant, or give the complainant any right to claim that title as purchased for his benefit. The only duty of Keiley is to perform his agreement and pay the amount agreed by him. There must be a decree that the defendant Keiley, upon the tender of a good and sufficient deed by the complainant to him, conveying the title to the Singer lot as it was conveyed to him by Alexander Singer and wife, pay to the complainant \$100, with lawful interest from April 7th, 1869, and the complainant's costs of this suit. All other relief sought by the complainant's bill is denied.

No relief can be granted to a defendant by any positive decree, and the complainant cannot be decreed in this suit to hold the title to the Singer lot as trustee for the defendant, as claimed by his counsel on the argument. If he holds, as he claims, the legal title by the Singer deed, he need not tender the title, and the defendant will be put to his suit to obtain his right, if any he have. If, on the other hand, the complainant only holds under the Singer deed an equitable title, or the right to have the legal title conveyed to him, the decree refusing that relief, will leave the legal title in the defendant, free from all equity of the complainant.

 Bird's Administrator v. Inslee's Executors.

BIRD'S ADMINISTRATOR vs. INSLEE'S EXECUTORS.

Bill to revive a suit in equity, founded on a judgment obtained more than twenty years before the bill was exhibited: the judgment will be presumed to be paid and the bill of revivor dismissed.

When the facts stated in the bill show that the claim upon which it is founded is barred by the statute of limitations, or by the equitable presumption of payment in analogy to such statutes, advantage of the statute may be taken by demurrer.

On demurrer to bill of revivor.

Mr. G. C. Ludlow, for demurrer.

Mr. John Whitehead, contra.

THE CHANCELLOR.

The complainant, by his bill of revivor, seeks to revive a suit brought by David Bird, his intestate, against Simeon Drake and George Inslee. Bird had obtained a judgment

Middlesex county Circuit Court against Drake, on the 10th day of July, 1846, and by virtue of an execution issued on it had a levy made upon a farm in the county as the property of Drake. Drake had, about a month before this judgment, conveyed this farm to George Inslee. In October, 1847, Bird filed his bill in this court to set aside this deed as against his judgment, on the ground of fraud.

The object of the present bill is to revive that suit against the heirs, devisees, and executors of Inslee, who has died.

In support of the demurrer it is insisted that the judgment on which the original bill is founded must be presumed to be paid, and therefore no action can be maintained founded upon that judgment, or in which the equity of the complainant depends upon it. By the statute of limitations no *scire facias* can be issued, or action brought upon a judgment after twenty years.

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And it has been held by the Supreme Court that a judgment should be presumed to be paid after twenty years, although an execution had been issued upon it and a levy made on lands, and proceeding on the execution been restrained by an injunction out of this court. *Buchanan v. Rowland*, 2 South. 271. In *Gulick v. Loder*, 1 Green 68, the Supreme Court again, in an opinion delivered by Chief Justice Ewing, approve of and affirm this doctrine, and apply it in a suit upon a judgment obtained in Pennsylvania, to which the statute of limitations of this state does not apply.

In this case, from the facts stated in the bill of revivor, the presumption of payment arises, and therefore the question is properly raised by demurrer. It is the settled doctrine of equity that the statute of limitations can be taken advantage of by demurrer, when upon the facts as stated in the bill the claim is barred by that statute. *Story's Eq. Pl.*, § 751.

The demurrer is well taken and must be sustained, and the bill dismissed.

 CARRICK'S ADMINISTRATOR vs. CARRICK'S EXECUTOR.

When an executor who has so far administered the personal estate of his testator as to convert it into money, dies, and administration *de bonis non* is granted, the administrator is not entitled to demand of the executor of such deceased executor the part of the estate converted into money; for that, the representative of the deceased executor must account to the legatee or next of kin. He is only entitled to such chattels or choses in action as have not been so converted, and exist as they were at the death of the first testator.

Argued on bill, answer, and proofs.

Mr. H. A. Williams, for complainant.

Mr. B. Williamson, for defendant.

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THE CHANCELLOR.

Alexander Carrick, of Paterson, died January 1st, 1831, having made a will dated May 19th, 1817, executed in the presence of two subscribing witnesses, which was admitted to probate by the surrogate of Essex county on the 15th of January, 1834, as a valid will of personal estate. Probate was granted to his brother Robert, one of the executors named in the will. He gave all his property to his executors, in trust, during the life of his mother, to receive and pay the income to her, and at her death to pay the principal to his two brothers, Robert and James, and to his two sisters, Bethia and Janet, with a provision that if either should die before a division, her share should be payable to his or her heirs, executors, or assigns. James Carrick, the brother of Alexander, died in 1836, leaving children; and the mother of Alexander died in 1839.

Robert Carrick, at the death of Alexander, was in partnership with him, under the name of A. and R. Carrick. Their business was cotton-spinning, and they owned a mill, with a large amount of cotton machinery, at Paterson. After the death of Alexander, Robert continued this business with this mill and machinery. He added largely to the machinery, and improved the building. In 1849, the mill was burned, with the machinery in it. After the fire, on an appraisement made by Robert and the insurers, the remnants of the machinery were valued at \$18,356.13, and the building at \$718. What became of these remnants does not appear in the cause.

After the death of his mother, Robert paid about \$37,000 of the estate of Alexander to each of his two sisters, but paid nothing in part to the children of his brother James. Robert, of course, was entitled to retain one-fourth for his share.

Robert and Alexander had, in the lifetime of both, received £100 sterling, the principal of the jointure of their mother, which came to their hands as two of the trustees under a marriage settlement of their father, with a much larger amount of property. After Alexander's death, Robert being

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the sole surviving trustee, by virtue of a power in the original settlement by his father, appointed three other persons to act as trustees with him. Two of these are still living.

Robert Carrick died in 1867. His will was proved shortly after his death, and probate granted to William Gledhill and Edward S. Pigot, two of the executors named in it; the widow of Robert Carrick, the other executor, having renounced. William Gledhill died in December, 1869, leaving Pigot the sole executor. In October, 1869, the surrogate granted to Samuel Smith, the complainant, letters of administration *de bonis non* of the estate of Alexander Carrick, deceased, with the will annexed.

This bill is filed by Smith as such administrator, against Pigot as surviving executor of Robert Carrick, for an account of the estate of Alexander Carrick in his hands.

As it nowhere appears in the case that there was in the possession of Robert Carrick, at his death, or that there has at any time since been in the possession of the defendant, any articles of personal estate, or any money or securities for money, *in specie*, or the same articles that Alexander left at his death, and the whole of his personal estate must be assumed to have been converted by Robert, the main, if not the only question in the cause is, whether an administrator *de bonis non* can maintain an action against the executor of the original executor for that part of the estate which he has administered by converting it into money, or whether the legatees or next of kin are entitled and bound to look to the representative of the executor for their share of the *assets* thus converted and in his hands.

There is no statute in New Jersey affecting this question, as there is in many of the states, and as there is in this state when an executor or administrator is removed for cause.

In England, it seems always to have been considered that an administrator *de bonis non* could only administer such personal property of the deceased as was still remaining *in specie*, in the form in which it existed at the death of the deceased; and that all that the first executor or administrator

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had converted into money was administered so far that it not belong to the administrator *de bonis non*. This question was raised in Pennsylvania, in *Potts, Adm'r de bonis non* *Ray*, v. *Smith, Ex'r of Smith*, 3 *Rawle* 361. In the opinion of the court, delivered by Justice Kennedy, the decisions in England are fully collected and analyzed, and, as the result, the court held that an administrator *de bonis non* cannot sue the representative of a deceased executor for such part of the estate of the first testator as he had converted into money. This was in accordance with the decision in *Allen v. Twinn*, 1 *S. & R.* 549, in the opinion delivered by Chief Justice Tilghman. The courts of England sustain this doctrine in many cases. *Attorney-General v. Hooker*, 2 *P. W.* 156; *Wankford v. Wankford*, 1 *Salk.* 306; *Barber v. Talcot*, 1 *Wm.* 473; *Jenkins v. Plum*, 1 *Salk.* 207; *Betts v. Mitchell*, 1 *Id.* 315; and see conflicting authorities in 2 *Williams on Executors* 865, note 1; 2 *Redfield on Wills* 91.

The children of James are entitled, directly, to call upon the defendant, as executor of Robert Carrick, to account to them for their share of the estate of Alexander administered by Robert Carrick, and to a decree for payment of that share, when ascertained.

If the complainant can find any of the personal property of Alexander yet existing, he has a right to take and administer it, and to his action against the defendant or any other person who detains it from him, or who has converted it. On April 21st, 1868, the date of the act which prohibits an executor of an executor from administering on the estate of the first testator.

The bill of the complainant must be dismissed.

Corwine v. Corwine's Executors.

CORWINE *vs.* CORWINE'S EXECUTORS.

1. A gift of all the residue of the testator's estate not before disposed of, contained in a will which only directs the payment of debts and bequeaths pecuniary legacies with other provisions, makes these legacies a charge upon the real estate, when it appears that the testator had not at his death, or the time of making his will, sufficient personal property to discharge these legacies.

2. Specific bequests cannot be made to contribute to make good a deficiency to pay pecuniary legacies.

Argued on final hearing, upon pleadings and proofs.

Mr. E. T. Green, for complainant.

Mr. Kingman, for defendants.

THE CHANCELLOR.

Gideon R. Corwine, who died in 1868, by his will made in that year, directed his debts to be paid, and bequeathed to his daughter, the complainant, \$2000; to his daughter Phebe Farley, \$1200; and all his furniture to his son the defendant, and his two daughters. He then gave the entire residue of his estate, real and personal, not otherwise disposed of, to his son, the defendant Cornelius Corwine, his heirs and assigns forever.

The debts of the testator were about \$750. These, with the two legacies of \$3200, far exceeded the amount of the personal estate possessed at his death, which was only \$2200, and that which he possessed at the making of his will.

The bill is filed to have the legacies, or the amount of them above the personal estate not specifically bequeathed, declared a lien on the real estate devised to the son by the residuary gift.

The decisions of this court in the cases of *Van Winkle v. Van Houten*, 2 *Green's Ch.* 172, and *Dey v. Dey's Adm'r*,

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4 *C. E. Green* 137, settle the question. The doctrine established by these cases and the authorities cited, is this: That a gift of all the residue of testator's estate not before disposed of, contained in a will which only directs the payment of debts and bequeaths pecuniary legacies in its other provisions, makes these legacies a charge upon the real estate, when it appears that the testator had not at his death, or the time of making the will, sufficient personal property to discharge these legacies. Such provisions in a will are not alone sufficient, although they afford a strong presumption of the intent, to charge the real estate with the deficiency; yet some proof in addition is required, and the facts above mentioned are held to make full proof of such intention.

The furniture specifically bequeathed, on well established principles, cannot be called upon to make good a deficiency in pecuniary legacies.

These legacies must be declared a lien upon the real estate devised to the son, for the deficiency of the personal estate in payment of them.

STRONG vs. VAN DEURSEN and OPIE and others.

1. A purchase money mortgage has preference over lien claims for work and materials put upon the property by contract with the purchaser, between the execution of the contract of purchase and the conveyance.

2. An assertion by the person holding the legal title to lands, made to parties about to erect buildings thereon under agreement with the person who has a contract of purchase therefor, that they would be perfectly safe in going on, is not a contract with them to put up the buildings. It is not such consent as will bind the owner or the property; to have such effect it must be in writing.

Argued upon final hearing, on bill, answer, and proofs.

Mr. A. V. Schenck, for complainant.

Mr. G. C. Ludlow, for defendants.

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THE CHANCELLOR.

The complainant's bill is to foreclose a mortgage given by J. F. Beck to William Wright, and assigned by Wright to the complainant. The defendants, Van Deursen and Oppie, have title under the sheriff's deed on a judgment obtained against Beck, and against the premises upon a claim filed under the mechanics' lien law.

Wright, who owned the land, by a written contract made October 24th, 1870, agreed to sell it to Beck. After this agreement and before he received the deed, Beck employed Van Deursen and Oppie to erect a building on the premises. They finding, upon searching the records, that Beck had no deed for the lot, went with him to Wright to get his consent. They told Wright that Beck did not have a deed, and that they were not satisfied to go on with the building and that they came to get his consent. Wright said that he had sold the property to Beck; that everything was all right; that the delay in delivering the deed was on account of the lawyer; that Beck would get his deed in a few days, and should have had it a week ago; and that they were perfectly safe in going on. The building was nearly, if not quite, finished before the deed was executed or delivered. The deed and the mortgage of the complainant were both executed and acknowledged on the 14th of November, 1870, and were both recorded on the 8th of December; and the mortgage was assigned to the complainant on the 8th day of December, 1870.

Van Deursen and Oppie filed their building lien February 24th, 1871. This lien was for work and materials in erecting this building. On this a general and special judgment was obtained against Beck and the premises, which were conveyed to them by the sheriff by deed dated December 4th, 1871.

Van Deursen and Oppie claim that their title is prior to and free from the complainant's mortgage, because the building was commenced before the mortgage was recorded. This question was raised and decided in the case of *The National*

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Bank of the Metropolis v. Sprague, 5 C. E. Green 13. In that case there was a written contract of sale, made six months before the deed or mortgage was delivered, and it was held that the purchase money mortgage had preference to lien claims for work and materials put upon the property by contract with the purchasers between the contract and conveyance.

They further claim that the representations and directions by Wright in the conference with him, amount to an employment or contract with them to put up these buildings.

I cannot consider anything that took place at the interview between Wright and these defendants, amounts to or can be converted into a contract or employment by him. Beck had engaged them to build for him. They knew that Wright had contracted to sell the property to Beck, and did not want or intend to build for himself. The object in seeing him was to get his consent and ascertain how the matter stood. He told them truthfully how the matter stood, and told them they would be safe in going on. Wright did not even give a direct, verbal consent, and a written one would have been necessary to bind him or the property. They knew when they commenced building that Beck had no deed, but only a contract to convey; that he had only the equitable, and not the legal title; and they must be held to a knowledge of the law that their claims under the lien law would be subject to any mortgage for the consideration. And without this strict rule of law they must be supposed to know that a mechanic or manufacturer, unless very wealthy, usually gives a mortgage for part of the consideration in the purchase of a lot. For this they made no inquiry, and perhaps were willing to rely on the increased value their work could add to the lot above any consideration mortgage. Had they inquired as to this, Wright would be held to answer truthfully. He disclosed fully and fairly all that he was inquired for, and made no promise. His representation that they would be perfectly safe, was intended, and can be held only to mean, that they might rely on Beck receiving his deed. He did not intend

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to guaranty the debt, and could not have made any lawful guaranty except in writing.

Another charge is that there was a fraudulent agreement between Wright and Beck to retain the deed until the building was erected, so that Van Deursen and Oppie might be kept in ignorance of the amount of the mortgage until the building was completed. There is no proof of this except the circumstances, which I do not think warrant this conclusion. And it is denied in their testimony by both Wright and Beck, neither of whom have any interest in the cause or in the question, except so far as the charge is an imputation on their characters.

The mortgage of the complainant is a valid encumbrance on the premises as against the defendants, Van Deursen and Oppie, and he is entitled to have the same paid out of the mortgaged premises.

 COLGATE'S EXECUTOR v. COLGATE.

1. A devise of real estate to trustees to pay the widow the income, will not put her to her election, under the sixteenth section of the dower act.

2. If the provisions of the will are inconsistent with the dower of the wife in the testator's real estate, the provision for her in the will will be held as intended in lieu of dower, and she shall be put to her election.

3. A devise of all the residue of testator's estate to his executors in trust, to sell and dispose of his real estate, and to convert the personal estate into money, and to divide the proceeds of his real and personal estate into two equal parts; to invest one of such parts, and pay the income thereof to his wife during her natural life, and on her death to divide the principal equally among his children then living, and to divide the remaining half into as many equal shares as he should leave children him surviving, and to pay one of such last named shares to each child, &c.—the rents and income of the real estate until the sale having also been directed to be divided in the same shares—is inconsistent with the estate in dower, and the widow must elect.

4. A contract made by an executor of a deceased member of a firm with a firm of which the executor is himself a member, for the sale to them of his testator's real estate, is not one which a court of equity will

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confirm, if it is opposed or contested by any of the *cestuis que trust*; much less will it decree a specific performance of it.

5. An agreement by testator's widow, (even if made,) that the firm of which he was a member should take his interest in real estate belonging to the firm, at a valuation made shortly after his death—the widow being entitled, under the will, only to the income of half of the estate during her life, and an infant to the other half absolutely on attaining age, and though appointed guardian, by the will, of such child, having no judicial authority to enter into any agreement or bargain with regard to his real estate—would not deprive her and the child of the right to have it sold at the full value it will bring at the time of the sale.

6. When it is necessary that lands held in trust should be sold, and the trustee is in a situation that induces him to give more than any other purchaser would give, the court may authorize a sale by him, at a full, fair price to be approved by the court, to himself or to some one for his benefit.

7. When a member of a firm holds lands in trust, and it is necessary that they should be sold, and the firm are willing to give full value for them, the court will order a sale and conveyance by the trustee, to or in trust for such firm.

8. In a case where an infant appears by his guardian *ad litem* only, and the interests of the infant require it, the guardian will be directed to employ counsel approved by the court to represent him.

9. One executor can sell and dispose of personal property; and a sale by him of the personal assets of his testator to a firm of which his co-executor is a member, is not, *ipso facto*, if there is no fraud, void. A sale by him and his co-executor to a firm so composed, would be liable to be set aside in equity, both on account of fraud, and for any inadequacy of consideration.

10. The executors having terminated the partnership of their testator pursuant to their powers, that termination of it is valid so far as to protect the firm from being liable to the estate for a share of the profits since made, and to protect the estate from a share of the losses.

This cause was argued upon bill, answer, and proofs.

Mr. Gilchrist, Attorney-General, for complainant.

Mr. Dutcher, for Sallie Colgate.

THE CHANCELLOR.

The bill filed in this cause was filed for the construction of the last will of Joseph Colgate, deceased, in regard to the claim of dower by his widow, and for the specific perform-

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ance of an alleged agreement made by Samuel Colgate, as acting executor of said will, and William Richardson, also named as an executor therein, to sell the testator's interest in the partnership assets of the firm of Colgate & Co., and in certain real estate owned by the testator and Samuel Colgate and Charles C. Colgate, as tenants in common, to Samuel Colgate and Charles C. Colgate, the surviving members of the said firm, or for a sale of such interests, and that Samuel Colgate, although such executor, may be at liberty to purchase the same.

The facts, as admitted by the pleadings or proved, are as follows: Joseph Colgate, a resident of and domiciled in the city of New York, died April 24th, 1865, while temporarily at Berlin, in Prussia. He left a last will, dated February 5th, 1864, and a codicil thereto dated March 3d, 1865, by which he directed the payment of his debts, &c., and gave and devised all the residue of his estate to his executors, or such of them as should qualify and take upon themselves the execution thereof, in trust, to sell and dispose of his real estate, at such time or times, and in such manner, either at public or private sale, and upon such terms as they might think proper, and to convert the personal estate into money, and to divide the proceeds of his real and personal estate into two equal parts; to invest one of such parts, and pay the income thereof to his wife, Sallie Colgate, during her natural life, and on her death to divide the principal equally among his children then living; the remaining half to be divided into as many equal shares as he should leave children him surviving; to pay one of such last named shares to each child that should have attained the age of twenty-one years; to invest one of such shares for each of his children who should be a minor, and to pay the income thereof, or so much as might be necessary for his support, to such minor until he should attain the age of twenty-one years, and allow the residue of such income to accumulate for his benefit, and upon his attaining that age, to pay to him the principal and accumulations of such share.

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The testator authorized his executors to join with any persons in the voluntary sale or partition of his real estate held in common, or in which he held any divided interest or interest at the time of his death. He directed that his real estate should be sold, the executors should receive the rents, issues, and profits thereof, and apply the same to the same uses and purposes as the income from the rents and profits were directed to be applied.

The testator appointed his wife Sallie Colgate, his brother Samuel Colgate, and his friend William Richardson, the executrix and executors thereof. The codicil related only to a contingency that did not occur.

The will was proven before the surrogate of the county of New York, by whom letters testamentary were issued to the said Samuel Colgate and William Richardson, September 18, 1865, and was also afterwards proven before the surrogate of Hudson county, New Jersey, June 8th, 1867, by which letters testamentary were issued to the said Samuel Colgate, who alone qualified in New Jersey.

The testator left surviving him his widow, Sallie Colgate, two children, Eugene Colgate and Mortimer Colgate. Mortimer died November 15th, 1869, (since the bill was filed in this cause,) in infancy, intestate, and without issue.

The testator, prior to and at the time of his death, was a member of the firm of Colgate & Co., manufacturers of and dealers in soap. The firm was composed of said Samuel Colgate, the defendant, Charles C. Colgate, and the testator, each partner having an equal one-third interest therein. The assets of the firm consisted of bills receivable, stock manufactured and unmanufactured, in New York and New Jersey, leasehold property in New York, and the tools, machinery, and furniture used in the manufacture and sale of soap, situate in their factories in Jersey City, and in their warehouses in New York.

The testator also owned in fee, as tenant in common with Samuel Colgate and Charles C. Colgate, one undivided third of certain real estate situate in Jersey City, known as

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the "Starch Factory Property," and also of certain real estate situate in that city known as the "Soap Factory Property." Each tenant in common owned an equal undivided one-third part thereof. This real estate, although so vested in each partner individually, was entered upon the books of the firm, and was used by the firm in their business.

After the death of the testator, Sallie Colgate, with her children, remained in Europe until after the alleged agreement hereinafter mentioned. Charles Colgate, her father, assumed to consult on her behalf with the executors and surviving partners, but had no authority, and did not assume to bind her by his acts.

On the testator's death, the surviving partners continued the business of the firm to July 1st, 1865. Then, or as of that date, they closed the books of the firm, made an inventory of its assets, appraised the bills receivable as they thought best, the merchandise at what they thought was the market value, and the tools, fixtures, and furniture, and the leasehold property in New York, at the cost as they stood on the books of the firm, and also appraised or carried out the "Soap Factory" real estate at cost, as it stood upon the books. Thereupon, and before the will had been proven in either state, Samuel Colgate and William Richardson, named in the will as executors, upon consultation with Charles Colgate, the father of the widow, made an arrangement with Samuel Colgate and Charles C. Colgate, the surviving partners, by which the latter were to take the testator's interest in the partnership assets at the prices so fixed by themselves, and also his interest in the "Soap Factory" real estate, except that the tools and fixtures and real estate should be again appraised, and that they would pay any increased valuation. The tools, fixtures, &c., were afterwards appraised by David Taylor and William Taylor, his son, both of whom were then in the actual employment of the surviving partners, at \$42,003. The leasehold property in New York was again appraised, by Messrs. Gilbert and Clayton, and the value thereof was increased \$9,000. The surviving partners

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thereupon took possession of the personal property, and sold and used the same in the continuation of their business.

Afterwards, in March, 1866, the soap factory real estate was appraised by David Smith and Benjamin F. Woolsey, selected by the firm and Mr. Richardson respectively, at \$110,000. The valuations were made upon many of the lots separately, and in some cases the values of the lots and of the buildings thereon were ascertained separately. The arrangement for the sale of the real estate was never consummated by the payment of the price, or by the execution or delivery of deeds. The surviving partners, as tenants in common with the testator, have, however, continued in the possession thereof.

For the purpose of consummating this agreement for the sale of the real estate, about July 20th, 1866, a deed was sent to the widow, Sallie Colgate, to execute, but she refused to do so. After she had so refused, and in or after the year 1867, Samuel and Charles C. Colgate, the surviving tenants in common, removed some of the buildings, altered others, and erected new buildings upon the land, and made additions and improvements to the fixtures and tools. No effort was made to sell the interest of the testator in the partnership assets or in the real estate, to any other person.

It is claimed on the part of the defendant, Sallie Colgate, to have been established by the testimony that the value of the real estate was, at the time of the appraisement, greater than the appraised value, and that the same has since greatly increased in value.

Samuel Richardson, the other executor and trustee, Charles C. Colgate, the other partner, Bowles Colgate, admitted as a partner since the testator's death, Sallie Colgate, the widow, and Eugene Colgate, the surviving infant child of testator, are the defendants in the suit.

The first question is as to the right of the widow of Joseph Colgate, to dower in the undivided interest of her husband in the real estate. The devise of his real estate to trustees to pay her the income or a part of it, is not such devise as will

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put her to her election under the sixteenth section of the dower act. This was decided in the Supreme Court in the case of *Vanarsdale v. Vanarsdale*, 2 *Dutcher* 404.

A more difficult question is that raised on this will, whether its provisions are not so inconsistent with her right to dower as to show that the testator intended the gifts to her as in lieu of dower. The authorities all agree, that if the provisions of the will are inconsistent with the dower of the wife in the real estate, the provision for her in the will shall be held as intended in lieu of dower, and she shall be put to her election.

The authorities and decisions in England differ as to what provisions in a will shall be held to be inconsistent with an estate in dower. They are cited and considered in 1 *Roper on Husband and Wife* 577. But the conflict in most of these cases depends upon questions that do not arise here, and the provisions held to be in lieu of dower are so different that the reasoning on which they were decided cannot be applied to this will.

In the case of *Chalmers v. Storil*, 2 *V. & B.* 222, decided by Sir William Grant, M. R., in 1813, the testator gave all his estates, real and personal, to his wife and two children, equally to be divided between them. In case of the death of both children in her life, he gave their share to her for life, and at her death he gave her share to the children. It was held that this disposition was inconsistent with her right of dower, and she was put to her election.

In the case of *Dickson v. Robinson*, *Jacob* 503, decided in 1822, Sir T. Plumer, M. R., held that a devise of all testator's real and personal estate to his wife, in trust for herself and her two daughters, was inconsistent with her claim for dower, and that she must elect.

In *Roberts v. Smith*, 1 *Sim. & Stu.* 513, Sir John Leach held that the provisions of a will that devised to the wife of the testator a messuage in fee, and devised all the rest of his estates, freehold and leasehold, to her and two other persons

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, to pay one-half of the income to her during her
 ood and the other half to the maintenance of his
 , were inconsistent with the claim of dower and were
 l to be in lieu of it.

of the conflicting cases are those in which an annuity
 en to the wife less than the income of the estate, or
 on part of the estate, or where part of the real estate
 ised to her for life or in fee.

e case of *Ellis v. Lewis*, 3 *Hare* 310, the provisions
 will were substantially as those in Colgate's will.
 ator devised all his real estate to a trustee, in trust to
 l invest the proceeds, and to pay the income arising
 e moiety of it to his wife during widowhood, and to
 income of the other moiety and of the whole after the
 r re-marriage of his wife, to his sister. Sir James
 a held that the devise should not be held inconsistent
 d in lieu of dower, and that the widow was not put to
 tion. He notices the three cases above mentioned,
 l that his determination did not conflict with them,
 ng that these cases did not intend to overrule the
 well established, that a mere devise of lands in trust
 did import an intention to devise it otherwise than in
 lower. He does not seem to have realized that the de-
 those cases was based upon the fact that the disposition
 roceeds in part to herself, was inconsistent with her
 dower, and showed an intention that this was in
 dower. He holds, without reference to authority,
 direction to divide the proceeds of the sale cannot
 what the subject of the sale is.

inclined to consider the judgment of Sir William
 Sir John Leach, and Sir. T. Plumer, as of more
 y than that of Vice-Chancellor Wigram, standing as
 alone.

in Colgate's will, the direction to collect the rents and
 of the real estate until the sale, and to divide them in
 e shares as directed as to the income of the proceeds,

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seems to me more clearly inconsistent with the estate in dower, and more clearly to show that these provisions for the widow were intended by him in lieu of dower.

In the case of *Stark v. Hutton*, Saxt. 216, the will directed all testator's real and personal estate, excepting his tavern-house, to be sold and applied to the payment of his debts. The tavern-house he gave to his wife during widowhood. She married again and demanded dower. Chancellor Vroom held, without reference to the statute compelling election in such cases, that this devise must be held to be in lieu of dower, and that her acceptance barred dower. He says, after reviewing the English cases: "The policy of the great mass of the English cases appears to have been to save the dower of the widow if possible; and for this purpose, numberless refinements and distinctions have been resorted to by the courts. Our policy, as manifested by our statute, is different." He holds that it is the settled rule at the present day, that express words of exclusion are not necessary in a will in order to bar dower; it is sufficient that there is a manifest and unequivocal intention, so plain as to admit of no reasonable doubt, and that the provisions of that will manifested such intention.

In *White v. White*, 1 Harr. 202, the testator ordered that his wife should have one room in his dwelling-house, and a comfortable maintenance out of his real estate, during her widowhood, and gave all his lands and real estate to his two sons. The first plea to the count of the demandant was, that this provision for the widow was intended in bar of dower. The Supreme Court unanimously held that this provision for maintenance out of the real estate was inconsistent with and barred dower, and sustained the plea.

I cannot avoid the conclusion that by the law, as settled in England and in this state, the provisions for the widow in this will must, when accepted, bar her right to dower. And it is hardly possible to doubt that the testator intended that one-half of the income should be all that she should receive,

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and did not mean that she should, in addition, have one-third of the share given to his children.

In the state of New York the decisions in *Wood v. Wood*, 5 Paige 596, and *Lewis v. Smith*, 5 Seld. 502, seem to be inconsistent with the above conclusion. But the Court of Errors of that state, in the later case of *Savage v. Burnham*, 17 N. Y. R. 561, where the testator devised all his real estate in trust to sell at the death of his wife, and directed that she should, during her life, take and receive one-third of the clear yearly rents and profits thereof, held that this was inconsistent with her estate in dower, and that the widow was bound to elect.

The next question is whether the transaction or understanding between the complainant and Samuel Richardson, as trustees and executors under this will, on the one part, with such concurrence as was given by Sallie Colgate, through her father, Charles Colgate, and the complainant and Charles C. Colgate, the surviving partners, on the other part, with regard to the disposition of the interest of the testator in the real estate and in the assets of the firm, is an agreement of which specific performance can be denied by this court, or whether that understanding, in whole or as to any part of it, can be confirmed by this court.

The real estate in this case belonged to the partners as tenants in common, and the testator was seized of one equal undivided third part, and in that third the other partners had no interest. And as the personal effects of the firm were more than sufficient to pay its debts, the creditors of the firm could have no claim upon it.

The real estate is devised to the executors named, "or such of them as should prove the will," in trust, at such times as they should think proper, to sell it. When this understanding was had, neither of the three executors had proved the will, and the devise in trust had not taken effect, and no one had power to make such agreement. The complainant proved the will in New Jersey, June 8th, 1867, and neither of the

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others has as yet proved it, or had letters testamentary. By the act concerning executors it is provided that where lands are devised to executors to be sold, and one or more shall neglect to prove the will, the trusts shall vest in the other executors or executor who shall prove the will. So that there has not been at any time, an executor or trustee who could convey this land to any person, except the complainant.

The rule is settled at law and in equity, and is not disputed, that an executor or trustee cannot, directly or indirectly, convey lands to himself, but such conveyance will be declared void as against the *cestuis que trust*. In this case, as the only bargain or contract as to the lands in this state was that made by the complainant with himself and his surviving partner, the agreement is not such a one as a court of equity will confirm, if it is opposed or contested by any of the *cestuis que trust*; much less will it decree a specific performance of it.

The title still remains in the complainant as trustee, and it remains in him as real estate, while he is bound to sell at such time as he may think proper; but when sold, the widow and surviving child are entitled to have it sold at the full value at the time of such sale, and to the rents of it until sold. The widow could consent to a sale as far as her right was concerned, but that is only a right to one-half of the income of the proceeds during her life. The infant defendant is entitled to one-half of the proceeds immediately, and to the principal of the other half at her death. The interest of the deceased child, as the land was not converted into money at the time of his death, nor directed so to be converted before that time, was real estate, and descended to his brother. No one has power to act for him. His mother is, by the will, appointed his guardian, but she cannot act as such until she has given security as guardian, and even then, without judicial sanction, she cannot convey his real estate or enter into any agreement or bargain that would affect it. Besides, there is not sufficient proof in this case to show that Mrs. Colgate did, at any time, assent to or acquiesce in this bargain as to the real estate.

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The interest of the testator in the real estate may be sold by the complainant as trustee, but it must be for its present value. And when it is necessary that lands held in trust should be sold, and the trustee is in a situation that induces him to give more than any other purchaser would give, the court may authorize a sale by him, at a full, fair price, to be approved by the court, to himself, or to some one for his benefit. This was held in *Campbell v. Walker*, 5 Ves. 678, and by the Supreme Court of the United States in *Michoud v. Girod*, 4 How. 503.

In this case, I am satisfied that the complainant and his co-partners, who own the other two-thirds of this property, can afford to give the full market value of this real estate as it stands, undivided, better than any other purchaser, who must take it subject to the right of partition and sale; and it is equitable and just, if they are willing to give the full value, that the interest of the testator should be sold to them. It is a proper case for this court to order that a sale and conveyance should be made by the complainant to or in trust for the firm of which he is a member. And if the members of that firm agree or elect to purchase the property at its present value, it must be referred to a master to ascertain and report the present full, fair value of the real estate in which the testator, at his death, was seized of one-third; that value to be computed as if the same buildings and improvements were now upon it as were there at his death, and the value of buildings or improvements put upon it since his death not to be computed as part of the value. As, in the question of value, the infant has the greatest interest, and is not represented by any guardian of his person or estate, or by any counsel acting for him, and the interest of his mother in some matters conflicts with his, it is proper that these interests should be protected by some one, other than the guardian *ad litem*, who, in this case, is the clerk of the court, appointed *pro forma*, only for the purpose of placing the infant within the jurisdiction of the court. The guardian *ad litem* must therefore be directed to employ proper counsel, approved by the court, to represent the infant in this

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investigation, whose compensation, as well as the expenses necessarily incurred in the investigation, will be directed to be paid by the trustee out of the moneys of the infant in his hands. An account must also be taken of the rental value of this real estate as it existed at the death of the testator, one-third of which must be accounted for to the estate of the testator.

The personal property of the firm at the death of the testator did not survive to the surviving partners. One-third of it vested in the executors. The debts of the firm had first to be paid out of it, and for that purpose the surviving partners were entitled to collect debts due to the firm, and, if necessary, to sell its visible chattels; but of the residue, one-third vested in the executors. This they had power to sell and dispose of.

The business of this firm was in part in New York and in part in New Jersey, and the testator was a resident of New York, and his personal property must be administered and disposed of according to the law of his domicile, and by the executors who prove the will in that state, if they can obtain possession of it. Richardson proved the will in New York. One executor can sell and dispose of personal property, and he had power to sell the personal assets of the firm to a stranger; and if he disposed of them to a firm of which his co-executor was a member, this does not, *ipso facto*, if there is no fraud, make the sale void. That he and his co-executor disposed of the personal property to a firm so composed, would render the sale liable to be set aside in equity, both on account of fraud, and for any inadequacy of consideration.

In this case, Richardson and the complainant acting in New York, the place of the residence of the testator, and where the main business of the firm was carried on, terminated the partnership on the 1st of July, 1865. They had power to do this, and that termination of it is valid so far as to protect the firm from being liable to the estate for one-third of the profits since made, and protect the estate from one-third of the losses. The sale of the personal property

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was made upon a valuation by fair and competent appraisers, for full value, and should be confirmed, so far as chattels in this state are concerned. The only effect of this decree will be to settle the title to those specific chattels, and the question whether they were sold for full value will still be open for consideration in the courts of New York, in which the executors must render their account.

WILLIAMS vs. DORAN and wife and others.

1. Where the complainant's solicitor consented that the defendant might have an adjournment of the sale of his property, but, owing to the bad faith (if there was any) of the sheriff, or to the negligence of the defendant or the solicitor in not giving the sheriff instructions and attending the sale, the sale was proceeded with and the property struck off, the sale will not be set aside as against the complainant. He is entitled to his decree.
 2. An agreement to pay the debts of another must be in writing. Such agreement can be enforced at law, and is no defence or set-off to a suit for the foreclosure of a mortgage debt.
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Argued on final hearing, upon bill, answer, and proofs.

Mr. B. Williamson, for complainant.

Mr. A. S. Jackson, for defendants.

THE CHANCELLOR.

The bill in this case is an ordinary foreclosure bill, upon a mortgage given to the complainant by the defendants, Doran and wife, for \$10,000, dated November 27th, 1869. The mortgage was given upon property conveyed to Mrs. Doran by Williams at the execution of the mortgage, and was for the whole consideration of that conveyance.

The answer sets up that the mortgaged premises had been the property of Doran, but had been sold and conveyed to

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Williams by John Midmer, the sheriff of Hudson county, on the 28th day of October, 1869, for \$7000. That foreclosure was for the principal of \$6000, with the interest and costs on two mortgages given by Doran and wife, and held by the executor of Cecile Tonnele, deceased. Doran had procured two adjournments of four weeks each, from the sheriff, and asked for another of one week, which the sheriff told him he would grant, but directed him to see the solicitor in the suit, and get his consent. He saw the solicitor and got his consent, and so told the sheriff, but the solicitor sent no written direction, nor gave any by parol to the sheriff. On the day of sale neither Doran nor the solicitor appeared, and the sheriff, instead of adjourning the sale, sold and struck off the property to the complainant, who bid by an agent employed by him generally to purchase property when an advantageous purchase could be made. So far as the evidence shows, Williams or his agent knew nothing of any request to adjourn, or of any arrangement between Doran and the sheriff or the solicitor in that case. The bad faith, if there was any, was that of Sheriff Midmer, and the negligence was that of Doran or the solicitor in not having given the sheriff direct verbal or written instructions to adjourn the sale, and in not attending the sale. Williams was a stranger, a capitalist seeking investment for his money wherever it offered on advantageous terms. There is nothing in the case, if it was presented on bill filed for that purpose, that would authorize setting aside the sale as against him.

After the sale, Doran, who had been deceived or misled by the sheriff or his own negligence, applied to Williams to convey the property, which he represented as worth \$28,000, and which is shown to be worth about \$20,000. Williams, who had expended several hundred dollars in paying taxes in arrear, in commissions to the real estate agent who purchased for him, and in searches as to the title, agreed to convey it back for \$10,000, to be secured by mortgage on the property. Some discussion was had whether it had better be conveyed to Doran or to his wife—a question in which Wil-

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liams had or took no interest; and it was finally agreed that it should be conveyed to Mrs. Doran, and it was so conveyed by Doran's consent, and he joined in both the bond and mortgage upon which this suit is brought.

He contends in his answer and in the evidence, that Williams agreed to pay certain of his creditors named in a schedule given by him to the sheriff, debts to the amount of about \$3000. This promise is proved by Doran; no one else testifies to it. McDonald, one other witness, testifies that he thinks Williams said that the creditors would be all right, but he says he would not swear that Williams agreed to settle with Doran's creditors.

Williams denies, in his testimony, that there ever was such agreement, and it seems improbable that a stranger to the parties, who was investing for profit or speculation, if he had purchased property worth \$20,000 for \$7000, and paid several hundred dollars in addition, would agree to convey it back, and lose all he had expended in addition to the \$7000. No mention was made of this arrangement at the time the deed and the bond and mortgage were executed in presence of the attorney who had prepared them. It would seem natural that this understanding, which was an essential part of the transaction there consummated by these papers, would have then been stated, if not reduced to writing.

The burden of proof is upon the defendant, who sets up this agreement.

If the suit was upon this agreement, which is a promise to pay the debts of another, the agreement to sustain it must be in writing, and if allowed as a defence to this mortgage, the same proof should be required. And if there was such an agreement in writing, it could, if not void for want of consideration, be enforced at law, and would be no defence or set-off on the foreclosure of this mortgage.

The complainant is entitled to a decree for the amount of his mortgage debt, interest, and costs.

Sutro v. Wagner.

SUTRO vs. WAGNER.

1. When upon motion to dissolve an injunction granted in a suit by one partner against another for a dissolution, an account and a receiver, it appeared that the defendant had deliberately resolved to break up and ruin the business of the firm, and the personal relations of the two partners were such that they could never carry on the business together to advantage, the injunction was retained and a receiver appointed.

2. Motion to dissolve denied, with costs; the costs of the motion for receiver to abide the event.

There was notice on part of defendant of a motion to dissolve an injunction heretofore granted in this suit, and a notice on part of the complainant for the appointment of a receiver. By consent, both motions were argued together.

Mr. Borchertling, for complainant.

Mr. Guild, for defendant.

THE CHANCELLOR.

This suit is by one partner against the other, for a dissolution, an account, and a receiver. The grounds of complaint are: a failure by the defendant to fulfill his partnership obligations, his neglect and refusal to proceed with any efficiency in the business, his fraudulent appropriation of the funds, and his fraudulent voluntary conveyance of his separate property to his son, for the purpose of placing it beyond the reach of creditors of the firm, so as to leave the complainant's separate property liable for the debts of the firm beyond its assets, and giving notice of such transfer to the mercantile agency, for the purpose of ruining the credit of the firm.

The answer of the defendant denies some of these charges, but not all. The voluntary transfer of his separate property, and the notice of it to the mercantile agency, are not denied.

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These, in connection with some other matters not denied, are sufficient to show that the defendant had deliberately resolved to break up and ruin the business of the firm. And the personal relations of the two partners are such that they can never carry on the business together to advantage. The injunction must be retained, and a receiver appointed.

The motion to dissolve is denied, with costs. The costs of the motion for receiver must abide the event.

HASKELL and others vs. WRIGHT.

1. By deed, H. dedicated certain lands for the purposes of a private pleasure ground, in trust, that the trustees should "forever thereafter suffer and permit Llewellyn Park and its appurtenances, with its several roads or avenues, and ways or rights of way, as laid down on the said map, to be fully and at all times used and enjoyed as a *place of resort and recreation*, by the several persons," &c. The deed provided that certain managers should have the exclusive control of the park for the prescribing and enforcement of rules and regulations for the use and enjoyment thereof. Purchasers of certain lots outside of the park, belonging to H., were to be permitted to use and enjoy said park, and said roads or avenues, and ways or rights of way, for the like purposes, and upon the same terms, &c. H. conveyed a lot to W., with this clause: "Also as an easement appurtenant thereto, the right to use, frequent and enjoy a certain private pleasure ground in the vicinity thereof known as Llewellyn Park *for the purposes*, and upon the terms, charges, restrictions, and regulations set forth in the deed of conveyance, &c., for the said park, made by said H. to said trustees." W. therein covenanted that he, his heirs or assigns, would not erect or permit upon the premises any hotel, slaughter-house, steam engine, &c., or any other place or building for the accommodation of any other trade or business, dangerous or offensive to the neighboring inhabitants. Upon bill for injunction by H. and others, *held*—

1. That the blasting or breaking stone by W. on his lot was a business for profit or for sale of the stone, was a violation of his covenant, and must be enjoined; also, the use of the avenues of the park for carting away the stone from his lot for the purpose of selling them. 2. The removal of loose stone or rock on the lot, that do not require breaking, or grading the surface of the lot so much as is necessary to prepare it for building, are not violations of the covenant, and will not be enjoined. Nor will the sale of the stone carried off in good faith for that purpose be

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restrained. 3. The power given to the managers of the park, to prescribe and enforce rules and regulations for the enjoyment of it, is sufficient to protect those entitled to the enjoyment of it and its avenues, from injury by those claiming the right to use the avenues for carting building materials, or carrying surplus earth and stone away from the lots.

2. When the deed under which a purchaser holds title grants him the use of the avenues or roads in a private pleasure ground dedicated by the vendor to certain uses, subject to the restrictions and regulations contained in the deed of dedication, the purchaser will be restrained to the uses prescribed by the dedication.

3. When a conveyance provides a way of access for ordinary purposes to the lot conveyed, no way of necessity will arise, although that way is not sufficient for all purposes.

4. An acceptance of a conveyance, with a restricted right of way to the lot conveyed, bars the grantee from claiming a larger way as a necessity.

Argued on final hearing, upon bill, answer, and proofs.

Mr. C. Parker and *Mr. Blake*, for complainants.

Mr. McCarter and *Mr. J. W. Field*, for defendant.

THE CHANCELLOR.

The defendant has title to a lot in a certain tract in Orange, enclosed within four roads, and generally known as Llewellyn Park, which also contains a parcel of about fifty acres, conveyed to trustees by Llewellyn Haskell, and which alone is properly denominated Llewellyn Park. The defendant's lot adjoins Llewellyn Park proper, and is bounded by Mountain avenue, a road which is part of that park.

The defendant's lot is rocky; a great part of it is solid rock. Its depth is about six hundred feet, and it rises in the rear to an elevation of about one hundred and sixty feet above the front of it, on Mountain avenue. The defendant is engaged in the business of constructing roads of stone on the plan known as the McAdam or Telfer pavements, composed of broken or crushed stone. He began breaking up stone on this lot for this purpose, and erected a steam engine on it for crushing this stone, and other purposes. He carried

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the stone thus broken and prepared from his lot, over the avenues in the park, to the public highway. The steam engine and crusher were removed after the service of the injunction in this suit, but he still continues to cart away the loose stone lying on his lot, over certain avenues in the park designated for that purpose, in the order modifying the injunction.

The complainants insist that the defendant is not entitled to maintain any steam engine on his lot, or to carry on the business of breaking or crushing stone there, or to use the avenues of the park for carting the stone upon his lot out of the plot enclosed by the four roads, for the purpose of selling or disposing of them, or in fact for any other purpose. They insist that the deed under which the defendant claims title prohibits the erection of any steam engine, or the carrying on any offensive business, upon the lot, and that the park proper (which I shall call the park to distinguish it from the plot enclosed by the four roads, which I shall call the plot,) was conveyed to trustees upon trusts inconsistent with the use of the avenues in the park for such purpose as carting away large quantities of stone for sale or other purposes.

Llewellyn Haskell, on the 28th of February, 1857, owned the park, and also the plot, or so much of it as relates to the matters in question in this suit. He owned, besides, a distinct lot lying to the north of it, called Eagle Rock. The park, besides grounds and groves to be laid out and improved for ornament and pleasure, consisted of avenues laid out on the map of the park, intersecting and bounding the grounds, and branching out from them and intersecting and surrounding the plot. The grounds and avenues of the park altogether were fifty acres; the avenues varied in width from twelve to thirty feet.

On the 28th of February, 1857, Haskell conveyed the park to three trustees, by deed, executed by himself and wife and the three trustees. This deed recites that Haskell proposes to devote this tract to the purposes of a private pleasure ground, under the name of Llewellyn Park, which should at

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all times thereafter be used and enjoyed by such persons as then were or should become owners of certain other lands. The trusts declared in the deed, so far as they affect this controversy, were: That the trustees should "forever thereafter suffer and permit Llewellyn Park and its appurtenances, with its several roads or avenues, and ways or rights of way, as laid down on the said map, to be freely and at all times used and enjoyed *as a place of resort and recreation* by the several persons and parties thereafter mentioned, and their respective families, tenants, agents, and servants, that is to say: 1st. The parties of the first part, their heirs and assigns. 2d. Charles Harrison and his heirs. 3d. Margaret Williams, her heirs and assigns. 4th. Certain purchasers from Charles Harrison.

And further, that the trustees should permit Haskell, and every person or persons who might become the owner or owners of the tract known as Eagle rock, to pass and repass from the Valley road to the Eagle rock road at all times, and *for all purposes*, over and through said Llewellyn Park, by means of its several roads and ways, or avenues and ways, as laid down on said map.

The deed further provided that Haskell, and other persons owning land in said plot, might, on the second Monday in January in each year, choose managers, (not less than three or more than nine,) who should have the exclusive control of the park for the enclosure, planting, maintenance, and decoration thereof, and for the prescribing and enforcement of rules and regulations for the use and enjoyment thereof.

It was also declared that persons who should purchase any villa sites out of any lands that Haskell should thereafter acquire in said plot, should be permitted to use and enjoy the said Llewellyn Park, and said roads or avenues, and ways or rights of way, for the like purposes, and upon the same terms as the persons purchasing sites out of land in the plot then belonging to Haskell. Haskell, who then owned the lot of the defendant, on the first day of January, 1869, conveyed it to J. S. Brown, who conveyed it to M. Mohor, by whom it

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was conveyed to the defendant. The deed given by Haskell for this lot contained the usual covenants by the grantor, and in it, as in all other deeds given by him for lots within the plot, this clause was added to the description of the premises granted: "Also, as an easement appurtenant thereto, the right to use, frequent and enjoy, a certain private pleasure ground in the vicinity thereof, known as Llewellyn Park, *for the purposes*, and upon the terms, charges, restrictions, and regulations set forth in the deed of conveyance for the said park, made by said Haskell to the said trustees."

It also contained a covenant by the grantee to Haskell, his heirs and assigns, that the grantee, his heirs or assigns, would not erect or permit upon the premises any hotel, livery stable, slaughter-house, smith shop, forge, furnace, steam engine, foundry, hat factory, tannery, brewery, distillery, or any other place or building for the accommodation of any other trade or business dangerous or offensive to the neighboring inhabitants.

This deed being that under which the defendant has title to his lot, he is bound by the covenant of the grantee, which is one that runs with the land. That clearly restrains him from erecting or permitting a steam engine or stone crusher, as is admitted by his counsel. The covenant is also not to permit on it any place for any business dangerous or offensive to the neighboring inhabitants. The complainants, who besides Haskell and the three trustees of the park, are some of the lot owners in the park, under Haskell, and reside there, contend that blasting stone on this lot is a business which, if not dangerous, is offensive to them, by reason of noise and disturbance, and of the park and its avenues being occupied and traversed by a large number of workmen of the kind engaged in such business, and that this is inconsistent with the purpose to which the park is devoted, and the villa sites in the plot intended.

I think so far as the blasting or breaking stone is carried on as a business for profit or for sale of the stone, that this comes within the letter and the spirit of the covenant. It

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cannot be permitted that the defendant shall quarry out or break up the stone on this lot for sale, down to the grade of the avenue. There is a mass of material there, principally rock, extending six hundred feet from the front to the rear of this lot, for its full width, of the average height of thirty feet. And if the profile in evidence gives the correct surface of the lot for its whole width, a succession of carts within five minutes of each other, with a load of a ton each, working ten hours a day every day in the year, would require seven years to remove this mass from each hundred feet of the width of this lot; and, in the meantime, the occupants of the neighboring lots would be annoyed by the continued noise and bustle and the throng of workmen going to and from their work—both matters peculiarly offensive to the occupants of villa sites in a plot set aside, as this is, for such residences. Quarrying out or breaking up stone here, if done as a business, as it most clearly has been and is done by the defendant, is within the covenant, and must be enjoined and prohibited.

But the defendant claims that this does not prohibit him from removing the loose stone or rock on his lot, that do not require breaking, or from grading down the surface of his lot so far as is necessary to prepare it for building. These are certainly not within the covenant, and so far as the work is carried on for that purpose only, it cannot be restrained by force of that covenant; nor will the fact that he sells or utilizes the stone carried off in good faith for that purpose, make it a business within the meaning of that covenant. But the defendant cannot be permitted, under the pretence that he is clearing off and grading his lot for the purpose of building, to quarry or break stone for the purpose of sale. It may be difficult to tell what part is done for profit or sale, and what part *bona fide* for the purpose of clearing off the lot for building. But he cannot be permitted to buy a lot like this, and level and clear it for the purpose of building, to the continued annoyance of all around him. He will be presumed to have selected and purchased this lot for the purpose of using it with the surface as it then existed, breaking and clearing off

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so much of the loose stone as it was necessary to remove for that purpose. This will not come within the prohibition of that covenant. Beyond this he must be enjoined and prohibited by the decree in this suit. And if any dispute arises whether the decree restraining him has been violated, it may be determined by a reference to a master to ascertain, with the assistance of a competent architect and landscape gardener, how much it is necessary to remove.

The complainants also insist that the defendant is not entitled to use the avenues of the park for the purpose of carting away large quantities of the rock upon his premises; that such use destroys the surface of these avenues, and renders them unfit for the purposes for which they are dedicated. These avenues are expressly dedicated to be used as a place of resort and recreation—at least so far as regards owners of lots in the plot. These are the words of the deed of trust. The owner of the Eagle Rock is not entitled to use them as a place of resort and recreation, but only for *passage* from the Eagle Rock road to the Valley road, and he is entitled so to use them “for all purposes whatsoever”—words in contrast with the declared right of the owners of lots in the plot, to use them with the park, for resort and recreation.

The dedication of these avenues in the deed of trust must be held, from the objects of the conveyance as declared on its face, to give the use of these avenues for access to the lots by persons purchasing, and to the inhabitants of houses on these lots the right of using them for all the usual purposes and necessities of such inhabitancy—at least for all not inconsistent with the purpose for which the park and its avenues were dedicated. The use of them for taking to each lot building materials for building houses on it, might be held to be included in the object as shown by the deeds; but if these avenues were used for this in such manner as to destroy the use of the park for the purpose for which it was dedicated, such use should be restrained.

The claim of the defendant that he had a right of way for these purposes, by necessity or by dedication, cannot be sus-

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tained. By the provision of the trust deed, he had a right to use the avenue in front of his lot for purposes within its provisions. The deed for his lot refers to the trust deed, and he must be held to have accepted the right of way therein provided, as his way. And when a way is provided which gives access, for ordinary purposes, to the lot granted, no way, of necessity, will arise, although that way is not sufficient for all purposes.

If a rear tenement is conveyed or leased, as is frequently the case, with a right of passage expressed in the deed through an alley-way of four feet wide, it does not give a right to have a way, of necessity, cut through the house or garden on the front of the lot, although the four-foot alley is not sufficient to pass a cart, or for many other purposes for which a way is usually needed. The defendant having accepted the conveyance of this lot, with a restricted right of way, is barred from claiming a larger way as a necessity.

Generally, the sale of a lot fronting upon a road laid down on a map, to which reference is made in the deed, will dedicate to public use that road and the other roads laid out on the map, necessary to give access to some public highway, and will grant to such purchaser a right of way over such road and roads to get to the public highway. But in this case the dedication is not by such implication, but by the map and deed of trust expressly referred to in the conveyance from Haskell, which alone can give support to the dedication. By the trust deed, the title of these lands passed out of Haskell, and took from him the power to make any further dedication of the lands included in it. The defendant's right to use these roads, therefore, must be restricted so as not to interfere with or defeat the purposes for which they were dedicated by the deed of trust.

But the power given to the managers of the park to prescribe and enforce rules and regulations for the enjoyment of it, is sufficient to protect those entitled to the enjoyment of the park and its avenues, from injury by such as claim the right to use the avenues for carting building materials to

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their lots, or surplus earth and stone from them out of the park.

They can, by exercise of this power, prohibit the defendant and others from using these avenues to take away from their lots stone or earth from below a certain grade, or beyond an amount that they shall judge proper and necessary, if they think that it will interfere with the enjoyment of rights that others have in the park. They can protect the avenues from injury by directing which shall be used for such purpose, and at what seasons of the year or hours of the day, by prescribing the width of tires on the wheels and the load of each cart or vehicle. Such regulations must be reasonable, and, when made, will be enforced against this defendant, as an express condition of the grant by which he has the right to use these ways for any purpose.

The complainants are therefore entitled to a decree restraining the defendant from carting over any of the avenues in the park any stone taken from his lot for any purpose, except such loose stones as it is necessary to remove for the purpose of fitting his lot for building and occupation. And in taking away such stone, it must be done in conformity to the rules and regulations that are or may be prescribed by the managers of the park.

DUDLEY vs. BERGEN and wife.

1. When the cancellation of a mortgage is procured by fraud, or made by mistake, or without authority and without actual payment and satisfaction, the canceling will be set aside and the mortgage enforced.

2. In a foreclosure suit no claims or debts against the complainant can be set off against the mortgage debt, except such as have been expressly agreed to be payment.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Gummere, for complainant.

Mr. R. Allen, for defendants.

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Dudley v. Bergen.

THE CHANCELLOR.

The defendants, Bergen and wife, on the 1st day of May, 1869, gave to the complainant a mortgage upon the lands of Mrs. Bergen, in Monmouth county, to secure \$3600, an amount which Dudley had agreed by contracts endorsed on the notes of Bergen, to pay for Bergen in seven months from that date. The condition of the mortgage was the payment of \$3600 in seven months from the date. These notes were paid by Dudley on the 6th of December, 1869, to the National Bank of Red Bank, which held them.

On the 10th of December, 1869, Dudley executed a satisfaction piece of the mortgage and delivered it with the bond to Bergen, the mortgage being in the office of the county clerk, where it had been left for record. The complainant alleges that this satisfaction piece was not given, because the mortgage was paid or satisfied, or for the purpose of discharging the land from the mortgage, but simply to enable Bergen to give a new mortgage for \$12,500, which he was about to make upon the same premises, priority over the complainant's mortgage. The complainant alleges and insists that the satisfaction piece was executed and delivered upon an agreement with Bergen, that Bergen and his wife were to execute a new mortgage for the same amount, which was to be executed immediately after the mortgage for the new loan of \$12,500, and was to be left for record at the clerk's office at the same time as that mortgage, or immediately after. This satisfaction piece was filed with the clerk of Monmouth county, December 10th, 1869, and an entry of discharge made upon the record of the mortgage, as directed by the act of April 2d, 1869. The mortgage itself was never canceled by tearing off the seals or in any other way, nor has any receipt been written on it. The clerk, two years afterwards when the mortgage was sent for, having searches made by the complainant's solicitor, without authority, endorsed on it the words, "canceled by certificate, December 10th, 1869. T. K. Arrowsmith, clerk." The defendants executed a mortgage for the new loan on the 10th of De-

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ember, 1869, which was recorded on the same day, but no new mortgage was made to the complainant. The complainant contends that his mortgage was wrongly and fraudulently canceled on the record, so far as the defendants are concerned, and that the same is, in his hands, a valid and subsisting encumbrance.

The defendants, in their answer, deny that when the satisfaction piece and bond were delivered to Bergen, or at any time, it was understood and agreed that it was merely for the purpose of enabling him to give a prior mortgage for the new loan, or that they were to execute a new mortgage to the complainant, and that the same was to be recorded together with or immediately after the mortgage for the new loan so that the security should be continued, and that the only effect of the transaction was to be that the mortgage for the new loan should have preference. The answer is, in this respect, responsive to the bill, and therefore requires to be overcome by more evidence than that of one witness.

The complainant and his book-keeper, G. H. Murphy, who, as both allege, were present at the transaction, testify explicitly that the bond and satisfaction piece were given to Bergen for the purpose, and on the understanding set forth in the bill. This proof is sufficient to overcome the effect given by law to the responsive answer. Bergen, in his testimony as in his answer, denies this. The question is, then, upon the weight of the testimony. The parties contradict each other, and one may be balanced against the other; and a third witness, not interested in the controversy, sustains the complainant. So far as the weight of evidence depends upon the number of witnesses, it is on the side of the complainant.

The circumstances also support the complainant. He entered into partnership with Bergen in the canning of tomatoes. Bergen was in debt, harassed by claims and judgments; and the notes which the complainant undertook to pay for him were given to discharge these claims. As he had no property to secure the complainant, his wife joined in a mortgage on her property to secure him. On the 6th of

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December the complainant paid these notes, and it is in no wise probable that the complainant would, four days afterwards, give up and abandon the security which he held for the amount advanced, without consideration, for an insolvent. He might, when the security was abundant, postpone his mortgage to a permanent loan of a large amount.

The defendant, to rebut this presumption against his version of the affair, says that Dudley had in his hands sufficient of his part of the partnership assets to satisfy the amount due to him, and that he demanded the satisfaction of the mortgage as a right. This Dudley denies. And the defendant, in the course of his testimony, admits that he was mistaken in his calculation, and that there was not due to him sufficient to pay the mortgage debt, or more than half that debt. The complainant testifies that little or nothing was due to Bergen out of the profits of the partnership. It is clear from the testimony that there could not be sufficient to pay one-half of the mortgage, and it is therefore improbable that the complainant would have agreed to give up the security entirely.

When the cancellation of a mortgage is procured by fraud, or made by mistake, or without authority, and without actual payment and satisfaction, the canceling will be set aside and the mortgage enforced. *Miller v. Wack, Saxt.* 214; *Trenton Banking Co. v. Woodruff*, 1 *Green's Ch.* 117; *Lilly v. Quick*, *Ibid.* 97; *Banta v. Vreeland*, 2 *McCarter* 103; *Harrison v. Johnson*, 3 *C. E. Green* 420; *S. C., on appeal*, 4 *C. E. Green* 488.

In this case the satisfaction piece was entrusted to the defendants, only to be used in a certain manner and to effect a certain purpose. He abused the confidence reposed in him, and used it for another purpose; for his own benefit and to the injury of the complainant. This is a fraud which will be remedied by a court of equity. No relief is asked against the mortgagees under the new loan. So far as they were concerned, the satisfaction piece was rightfully used. Mrs. Bergen was no party to the fraud, but as against her all that

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is asked is that the mortgage should remain in its original position. It is held by the complainant, untorn and uncanceled, and has never been satisfied in fact. The entry on the record is the only matter that can be affected by the decree in this case, and she has done nothing, or acquired no rights on the faith of that entry, by which any wrong can be done to her by declaring it of no effect.

The defendant, Bergen, claims that the mortgage is paid and satisfied by the balance due from Dudley to him by the profits of the partnership.

In a foreclosure suit no claims or debts against the complainant can be set off against the mortgage debt, except such as have been expressly agreed to be payment. 3 *Powell on Mort.* 945, and note 1; *White's Adm'rs v. Williams*, 2 *Green's Ch.* 376; *Dolman v. Cook*, 1 *McCarter* 56; *Bird v. Davis*, *Ibid.* 467.

There is nothing in this case that amounts to an agreement to appropriate any balance due on the partnership account to the payment of the mortgage debt.

These conclusions render it unnecessary for me to examine into the partnership accounts, and to determine whether any and what amount is due on them from the complainant to the defendant.

The complainant is entitled to a decree for the amount of principal and interest due on his mortgage, and to a sale of the mortgaged premises to make such amount.



DUBOIS vs. SCHAFFER and wife.

Where a mortgage is canceled by mistake, or the canceling is procured by fraud, a court of equity will set aside and disregard the canceling so made or procured, and give relief upon the mortgage as if not canceled.

Dubois v. Schaffer.

Argued on final hearing, upon bill, answer, and proofs.

Mr. F. B. Ogden, for complainant.

Mr. I. W. Scudder, for defendants.

THE CHANCELLOR.

The complainant alleges that a mortgage given to him by the defendants was canceled in fact and of record by his agent, he supposing, by mistake, that it was paid in full, when, in fact, there was a balance of \$400 due on it. The bill asks to have the canceling done by mistake corrected and set aside, and for a decree to make the amount really due out of the mortgaged premises.

When a mortgage is canceled by mistake, or the canceling procured by fraud, the court will set aside and disregard the canceling so made or procured, and give relief upon the mortgage as if not canceled. The opinion in case of *Dudley v. Bergen*, in this court, *ante p.* 397, affirms that doctrine, and states the authorities upon which it is founded.

But for that purpose, when the relief is on the ground of mistake, the mistake must be clearly established. The agent of the complainant, if he is believed, clearly establishes the mistake, and he is confirmed by the admissions of the defendant to himself and to his brother. The mistake consists in crediting on the 1st of June, 1871, upon this mortgage, the sum of \$400 paid upon another mortgage of the defendants to the complainant, which was then given up and canceled.

The agent explains how the mistake was made, and the evidence for the defendants does not throw any serious doubt over the fact. He has and produces the receipts for all the other payments, but fails to produce any for a payment alleged by him to have been made to a brother of the agent, and which is denied by that brother in his testimony.

The complainant is entitled to the relief prayed for in his bill.

 Burgin v. Giberson.

BURGIN *vs.* GIBERSON and others.

1. An amendment will not be permitted to an answer after it has been sworn to and filed, except to correct a verbal or clerical mistake, or to amend or supply a formal defect. A supplemental answer must be filed, and this will be permitted even after replication, and the complainant has commenced taking evidence.

2. But leave will be granted to amend an answer only in cases where it clearly appears that the matter to which the amendment relates is material to the defence, and that the amendment is necessary to enable the defendant to bring the merits of his defence before the court.

3. Leave will be granted to file a supplemental answer for the purpose of stating a matter which the defendant had been told by counsel would constitute no defence, and which he did not, therefore, mention to his solicitor, who prepared the answer in ignorance of the existence of such defence. But it will be granted only on such terms as will do the complainant no injury, or create no serious delay.

This was a motion on part of Thomas J. Giberson, one of the defendants who had answered, for leave to amend his answer, or to file a supplemental answer; and on the part of the defendant James Giberson, to open a decree *pro confesso* entered against him, with permission to answer.

Mr. Pancoast, for motion.

Mr. P. L. Voorhees, contra.

THE CHANCELLOR.

The recent practice, both in England and this country, is not to permit an amendment to an answer after it has been sworn to and filed, except to correct a verbal or clerical mistake, or to amend or supply a formal defect, but to grant the relief applied for by permitting a supplemental answer to be filed. 1 *Daniell's Ch. Pr.* 781; *Dolder v. Bank of England*, 10 *Ves.* 284; *Bowen v. Cross*, 4 *Johns. Ch.* 375; *Vandervere v. Reading*, 1 *Stockt.* 446.

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In this case the replication has been filed, and the complainant has commenced taking evidence, but the time for taking testimony has not yet expired. Courts of equity are reluctant to grant leave to amend an answer, and in no case grant such leave, unless it clearly appears that the matter to which the amendment relates is material to the defence, and that the amendment is necessary to enable the defendant to bring the merits of his defence before the court.

There are many decisions on the subject of granting and refusing leave to amend answers. And yet, as observed by Chancellor Kent in *Bowen v. Cross*, "there is no precise and absolute rule on this subject. The question, as Lord Eldon said, is always applied to the discretion of the court, in the particular instance. It has been allowed after issue joined, on payment of costs of opposing the application, and withdrawing the replication." Chancellor Williamson says, in *Vandervere v. Reading*: "There are upward of fifty authorities upon the matter of reforming answers; and yet it will be found that the court has never been willing to go further than to permit the defendant to correct or add some single fact which had been mis-stated or omitted through mistake, fraud, or accident."

In this case the application is to insert a matter omitted to be put in the answer, which, as stated in the affidavits on which this motion is founded, may constitute a defence to this suit. It was omitted in the answer, because the defendant had been told by counsel that it would constitute no defence, and he did not, therefore, mention it to the solicitor who prepared the answer, who was, therefore, ignorant of the existence of such defence. In *Nail v. Punter*, 4 Sim. 474, Vice-Chancellor L. Shadwell gave leave to file a supplemental answer for the purpose of stating facts which the defendant had wished to state in his original answer, but had been prevailed upon to omit by the mistaken advice of his solicitor. This case is substantially the same, only the advice here was by other counsel, not by his solicitor. In both, the defendant was really misled by counsel. I think it is a proper case

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for the discretion of the court to be exercised. It will be granted, after replication. *Jackson v. Parish*, 1 *Sim.* 505; 1 *Daniell's Ch. Pr.* 782; 1 *Barb. Ch. Pr.* 167.

But the leave must be granted on such terms as will do the complainant no injury, or create no serious delay. There was not time from the filing of the replication, according to the course of practice, to complete the taking of the testimony on both sides, and to set down the cause for hearing at the next term.

Leave to file a supplemental answer in twenty days will be granted. It must be confined to the matter set forth in the affidavits. The complainant must have leave to withdraw his replication; and if he does not elect to withdraw it, it shall stand as the replication to the supplemental answer. The depositions taken by the complainant must stand as proofs in the cause, and the defendant Thomas J. Giberson must pay the complainant's costs on this motion, and furnish the complainant's solicitor with a copy of the supplemental answer within five days after filing it.

The decree *pro confesso* against James Giberson will be set aside, and he will be permitted to answer upon payment of costs; his answer to be filed within twenty days, and the depositions taken to stand as evidence against him.

GAUSEN vs. TOMLINSON and VAN WINKLE.

1. The guaranty of a bond cannot create a lien by way of mortgage on real estate of the guarantor, nor will the fact that such bond is secured by a second mortgage on lands upon which the guarantor holds a prior lien by mortgage or judgment, create a lien on such lands, or the interest which the guarantor has in them.

2. Priority of record will not give preference to one mortgage over another given at the same time and held by the same person. Such mortgages, in the hands of assignees, are concurrent liens, payable ratably out of the proceeds of the mortgaged premises, after payment of costs of both.

Gausen v. Tomlinson and Van Winkle.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Collins, for complainant.

Mr. Paulison, for Van Winkle.

THE CHANCELLOR.

On the 1st day of December, 1870, James H. Carpenter conveyed the mortgaged premises to the defendant, Tomlinson, and received for part of the consideration two mortgages, one for \$500, and the other for \$1000. Each recited that it was given for part of the consideration. Both were left at the county clerk's office for registry on that day—the one for \$1000 at 10 o'clock A. M., the other at 2 P. M., and were registered in that order. On the 3d of February, 1871, Carpenter assigned the mortgage for \$500 to Henry McDonalds, and endorsed on the bond which it was given to secure, his personal guaranty that the bond should be paid. By several mesne assignments, the bond and mortgage were assigned to the complainant. The assignment to McDonalds was recorded on the day of its date. The bond and mortgage for \$1000 were assigned by Carpenter to the defendant, Van Winkle, on the 10th of February, 1871, as collateral security for the payment of his own bond and mortgage given for that amount.

The bill is filed to foreclose the \$500 mortgage, assigned to the complainant. The complainant claims that the guaranty of payment of the bond made by Carpenter, when he held the other mortgage, created a preference over that mortgage; that it amounted to a mortgage of all his then interest in the lands.

I know of no principle that would create a preference by such guaranty. The guaranty of a bond cannot create a lien by way of mortgage on real estate of the guarantor, nor will the fact that such bond is secured by a second mortgage on lands upon which the guarantor holds a prior lien by mortgage or judgment, create a lien on such lands, or the interest

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which the guarantor has in them. There is no authority or precedent for such doctrine, and there is no good reason for making a precedent to establish it. On the contrary, I think a person holding two mortgages, one clearly prior to the other, should be allowed to give his guaranty on transfer of the second, which most needs such guaranty, and hold the other with its preference that he might more readily dispose of it without guaranty. There is good reason to believe that Carpenter had the mortgage held by Van Winkle recorded a few hours before the other for the purpose of giving it preference and character, and then added his personal guaranty to the \$500 mortgage, because it was supposed to be second. The priority of recording will not have that effect between mortgages given at the same time, if held by the same person; the statute only gives that effect as against subsequent mortgagees, without notice. These mortgages must therefore be held to be concurrent liens, payable ratably out of the proceeds of the mortgaged premises. The complainant is entitled to a decree for foreclosure and sale, for the payment of the amounts due on his mortgage, and that held by Van Winkle, out of the proceeds of sale, after the payment of the costs of both parties.

HAULENBECK and others vs. CRONKRIGHT and others.

1. The estate or interest of a widow in lands in which she is entitled to dower, is the right to have one-third set off to her by metes and bounds, to enjoy the same for her natural life. Like all other tenants for life, she is not entitled to commit or suffer waste, and must keep the premises set off to her in repair.

2. When partition can be made of lands wherein an estate in dower is had, the dowress retains her estate as it was before. If dower has not been assigned, she retains the right to have it assigned. If an assignment has been made, she retains the part set off to her unaffected by the partition.

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3. If partition can be and is made, the dowress is not a necessary party to a partition suit in equity.

4. When a sale is made under proceedings in partition, the dowress is entitled by the supplement of 1855 to a just and reasonable satisfaction for her estate. This means full compensation for the loss which she sustains by having her estate taken from her by the decree of the court. The value of her estate must be computed from the use and profits she was entitled to derive from it if not sold.

5. It was not intended by the supplement of 1855 that the interest of one-third of the net proceeds was to be paid the dowress, or a sum in gross computed from the interest of such one-third, as a compensation for the sale of her estate.

6. When one person owns a life estate or an estate for years, and the reversion belongs to another, the owner of the reversion is entitled to all the benefit to accrue from the rise in value of the property before the falling in of the precedent estate.

7. Rules 130 and 131 are the rules of this court in sales of lands in partition proceedings, authorized by statute, and as such are, until changed, the binding law of the court.

8. It is a proper ground of exception that the master, in his conclusions as to matters of fact, has made a report contrary to evidence.

9. The conclusions of a master, who has examined and seen the witnesses, are always regarded in equity as entitled to great respect, and where his conclusions are clearly supported by competent witnesses who are unimpeached, his report will not be set aside because there is conflicting testimony, unless it clearly appears from the weight of such testimony and the nature of it that the master has erred. No error appears here.

This cause was argued upon the exceptions of Elizabeth Cronkright, widow of James Cronkright, deceased, to the report of the special master as to the gross sum to be paid to her in lieu of her dower in the lands of which her late husband died seized, sold by order of the court in a suit for partition.

Mr. W. B. Williams, for exceptant.

Mr. B. Williamson and *Mr. W. S. Whitehead*, for the heirs-at-law.

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THE CHANCELLOR.

The supplement to the partition act, passed in February, 55, authorizes the court in which the partition proceedings

had, to determine whether any existing estate of dower curtesy in the premises ordered to be sold, ought to be excepted from the sale, or whether the same should be sold. It also directs, upon such sale, that the court shall direct the payment of such sum in gross, out of the proceeds of the sale of the premises, to the person entitled to such estate in dower or by the curtesy, as shall be deemed a just and reasonable satisfaction for such estate or interest.

The estate or interest of a widow in lands in which she is entitled to dower, is the right to have one-third set off to her metes and bounds, and to enjoy the same for her natural life. Like all other tenants for life, she is not entitled to commit or suffer waste, and must keep the premises set off to her in repair. The duty imposed upon the court by the statute is, to determine in each case what is a just and reasonable compensation in money for this estate, when sold by its order. The sale in partition proceedings is not for the benefit of the dowress, nor are the partition proceedings for her benefit; she cannot institute them. They are instituted by one or more of the tenants in common for a partition of the estate among them, and when the partition can be made, the dowress retains her estate in the premises as it was before. If dower has not been assigned, she retains the right to have it assigned. If an assignment has been made, she retains the right set off to her unaffected by the partition. If partition is made and is made, the dowress is not a necessary party to a partition suit in equity.

When a sale is made, the dowress is entitled, by the statute, to a just and reasonable satisfaction for her estate. This means full compensation for the loss which she sustains by having her estate taken from her by the decree of the court. The value of her estate must be computed from the use and profits she was entitled to derive from it, if not sold. The value of a life estate in land must be computed on different

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principles from the value of the fee. In both cases the actual present income or profit must enter into the calculation. But in calculating the value of the fee, the future rise in value, in very many cases, is an important element in the calculation. Lots entirely unproductive, or nearly so, very often are certain to double in value in ten years, from their situation and the probable approach of improvements. This is the inducement of capitalists to purchase and hold lands in the vicinity of cities, which not only produce no income, but are subject to constant taxes and frequent assessments. Such lands are especially of little value when set off to a dowress. Then, the uncertain duration of her estate: Neither she nor her lessees or assigns could venture to improve them to any extent, even if the property should come into requisition during her life. To the owner of the fee, such unproductive lands are often a much more productive investment than could be had at compound interest.

Where one person owns a life estate, or an estate for years, and the reversion belongs to another, the owner of the reversion is entitled to all the benefit to accrue from the rise in value of the property before the falling in of the precedent estate. It would be unjust to take away or diminish this right by regulation made for the more convenient and profitable partition of lands, or for their sale, when necessary. It would be giving the property of one person to another. To reserve an outstanding estate in dower or by curtesy, on a sale of lands in partition proceedings, is in most cases very injurious to the sale, generally much more so than the value of the outstanding estate. Few will buy a dwelling-house of which one-third or every story might be set off to a dowress. In a manufacturing establishment it would be yet more detrimental to the sale; and even in a farm, very objectionable to one purchasing for his own use. The power to sell such estate with the property is a wise provision. But it was not intended, nor can it justly be used, to give to the dowress or tenant by curtesy a greater share of the proceeds of sale than the value of the estate taken away.

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The statute does not provide that the gross value shall be calculated upon one-third of the interest of the net proceeds of sale, or that the interest of one-third of the net proceeds shall be paid her for life, as was provided in the twenty-third section of the partition act, to induce her to consent to release her dower. But it directs the court to determine what shall be a reasonable sum in gross to be paid to her; or in case she does not elect to accept a sum in gross, what shall be a just and reasonable sum to be invested for her. These provisions show clearly that it was not intended that the interest of one-third of the net proceeds was to be paid her, or a sum in gross computed from the interest of such one-third.

In the provisions for the sale of estates by dower and curtesy in sales of lands of infants, by order of this court, similar provisions are made for ascertaining the value in gross of such estates, and for providing a sum to be invested for the life of the tenant.

These values must be ascertained in each case by the judgment of the court, and the Court of Chancery has adopted rules to be applied in cases of sales of infants' lands, to ascertain the value of such estates in dower or by curtesy. These rules, by reason of their generality, may, if strictly applied, in some cases work injustice; but it is, in practice, impossible to determine each individual case without some general rules for guidance.

The computation from the income only would be most just, if the income could be assumed to be fixed and permanent, and without change in the probable life of the life tenant. But in the position of real estate in New Jersey, which has for some time been constantly increasing in value and productiveness, and which will, with great probability, continue so to increase, it was thought, on adopting these rules, that a strict adherence to present income alone would be unjust to the tenant by dower or curtesy. In most or nearly all cases of such sales, the interest of the proceeds much exceeds the real income. The interest on the proceeds was therefore made the basis of the computation of the limit

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of the value to be allowed ; and upon ascertaining the value from the actual net income, in case of dower one-half, and of curtesy one-fourth of the excess of the value, calculated from the proceeds of sale, is directed to be added to the net income. The reason for restricting the value from income, which might seem most just, was both, because, in many cases, a temporary or accidental increase in actual income might be made the basis, and because (especially in the case of infants where the witnesses are often produced by those whose interests are adverse to them,) the yearly value is a matter of judgment and often of imagination, and witnesses can be selected whose opinions are well known to be always for the highest values. The difference in favor of dower was grounded in part on the rule of law which always favors dower, and in part on the fact that in the majority of cases the dowress is the mother of the infants or tenants in common, and any allowance to her will result for their benefit and contribute to their support.

It must be admitted that to a certain extent these rules are arbitrary, as all rules in law and equity, and in legislation where the adoption of rules is required to meet some emergency, and must be, in their origin, although founded on the best reasoning of the jurist or law-giver.

Rules 130 and 131, adopted originally for sales of infants' lands, are by rule 141 applied to sales of lands in partition proceedings, and they are the rules of this court, authorized by statute, and as such are, until changed, the binding law of the court.

The special master, to whom it was referred to ascertain the gross value of the dower of the widow, has in all things computed it according to the rules. But in ascertaining it, the yearly income, insurance, taxes, and repairs had to be ascertained by evidence. The exceptant maintains that the master's report is against the clear weight and effect of the testimony. It is a proper ground of exception that the master, in his conclusions as to matter of fact, has made a report contrary to the evidence.

The conclusions of a master, who has examined and seen

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the witnesses are always regarded in equity as entitled to great respect, and where there is conflicting evidence, and his conclusions are clearly supported by competent witnesses who are unimpeached, his report will not be set aside because there is conflicting testimony, unless the weight of such testimony, on account of the great number of the witnesses and the nature of their evidence, is such as to make it clear that the master has erred. The premises here are three valuable residences in the English neighborhood, in Bergen county, on the Bergen turnpike, each with a number of acres of land attached, such as to entitle them to be called farms. But their chief value is as country residences.

Two witnesses, produced by the exceptant, state that in their opinion two of these places would rent for \$2000 each, and the third for \$800 or \$900. The master has, in his calculation, taken the annual value of the first two at \$900 each, and that of the third at \$600.

These witnesses are real estate agents, residing at Englewood, six miles distant from this property. One of them has been concerned in letting houses, as well as selling real estate. But it does not appear that either of them had anything to do with property in this vicinity, or anywhere near it, such as to give them any knowledge of rents there. The value of the evidence of such agents as experts, if they can at all be admitted as experts, must altogether depend upon their knowledge of rents in the vicinity of the property.

The testimony of an agent, thoroughly acquainted with the yearly value of houses in the city of New York, would be of little value as regards houses in a country village. And the master may have rightly concluded that the evidence of agents who formed their opinions from the flourishing and wealthy town of Englewood, was of little value as to houses situate in a more rural and agricultural part of the county of Bergen.

The other witnesses are two inhabitants of the English neighborhood, who have lived on their own farms for fifty and twenty years, respectively, in the vicinity of this property ;

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one of them on a farm adjoining it, and who naturally, for years, would know the rents received for every house of any importance in the neighborhood. Of their credibility the master was the most proper judge. The third witness for the heirs or tenants in common is a resident in the neighborhood, who has been engaged as a real estate agent in the letting and sale of property in the vicinity.

The report of the master is warranted and sustained by the testimony of these three witnesses. I cannot, under any rule that should govern in such exceptions, determine that the master has erred. On the contrary, my own conclusions from the evidence, if it was my duty to determine the matter originally, would be much the same as those of the master.

The exceptions must be overruled.

THE MORRIS CANAL AND BANKING COMPANY *vs.* STEARNS.

1. Suspicious circumstances attending the confession of a judgment, in the absence of proof that the debt was not real, or that it was got up for a fraudulent purpose, will not warrant such decree.

2. The conveyance of the debtor's real estate having been made for a sum much less than its value, and the circumstances connected therewith showing that the conveyance was made to defraud complainants, it is void against them, and the lands will be sold to satisfy their judgment.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Williamson and *Mr. E. W. Runyon*, for complainants.

Mr. C. Parker and *Mr. R. S. Green*, for defendants.

THE CHANCELLOR.

Josiah O. Stearns died August 29th, 1867, intestate. He was never married. His brothers, Amos C. Stearns and Eckley W. Stearns, were his heirs-at-law. They and his

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another, Mehitable C. Stearns, were his next of kin. Administration of his estate was granted on the 16th of September, 1867, to his mother and his brother Amos, by the surrogate of Union county, in which he resided at his death. He died seized of several tracts of land in the county of Hudson, in his state, and of a tract in Clinton county, Pennsylvania.

The complainants commenced a suit against Eckley W. Stearns on the 17th day of October, 1867, in the Supreme Court of this state, in which they obtained judgment for \$3108.90, on the 2d day of January, 1868, and issued execution, which was levied on Eckley's interest in the lands of which Josiah died seized, in Hudson county.

Eckley was indebted to Josiah at his death. On the 27th of November, 1867, Eckley and the defendants had a settlement of this indebtedness. The amount was settled at \$78,-30.40. On the 16th of October, 1867, he conveyed to the defendants his interest in the lands of Josiah, in Hudson county. The consideration of this was \$15,000, to be credited on his indebtedness to the estate; and for the balance, \$63,930.40, on the 27th day of November, 1867, he gave his note to the defendants as administrators of Josiah, with a warrant of attorney to confess judgment for that amount, on which judgment was entered in Union County Circuit Court for the amount, with costs, on the 27th of November, 1867.

The indebtedness of Eckley to Josiah was computed from a note for \$9587, given by Eckley to Josiah, and from checks drawn and acceptances made by Josiah for him, found in Josiah's possession at his death, and which, at the settlement, Eckley admitted were accommodation checks and drafts by Josiah for him, and had been taken up by Josiah. Eckley died in 1868; and there was no other proof of this indebtedness than his admissions made at this settlement, and a computation in his handwriting, made at that time, of the principal and interest due on these claims.

The complainants allege that this indebtedness of Eckley to the estate was not real, but was got up between him and the defendants to cover Eckley's estate, and protect it from

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them and his other creditors, and that the conveyance of this real estate to them was without consideration and a fraud upon his creditors; that if he did owe the intestate, his distributive share of the estate was sufficient to pay all his indebtedness; and that the price of \$15,000 was far below the value of his estate in the lands, and that the sale at that price was a fraud upon them.

The settlement of his indebtedness to the estate, made by Eckley, and introduced into the evidence by the complainants, is proof of his debt to that amount, in the same manner as a note given by him to the intestate would be proof of it. In both cases, the *bona fides* of the transaction could be impeached by a creditor; and in the case of a note given pending suit, as this was, by an insolvent, this *prima facie* proof of the debt would be easily overcome. But here there is not any proof to show that this debt was not real, or that it was got up for a fraudulent purpose. The most that can be said is, that the circumstances are such as to give cause for suspicion.

On the settlement of their final account as administrators, the defendants charged themselves with the amount admitted by this settlement to be due from Eckley, and the balance in their hands for distribution, after payment of debts and expenses, was \$156,108, of which Eckley, as next of kin, was entitled to \$52,036. This the administrators could apply towards the payment of his debt of \$68,774.89 at that date, and it would leave a balance of more than \$16,000 due from him.

The value of the real estate of Josiah in Hudson county, at his death, was shown by different witnesses. Their estimates varied from \$56,000 to \$65,000. There was a contract entered into by him with Melick and Son, at the time of the purchase of these lands by them for him, that he would pay them one-fourth of the net profits on a sale; and as the lands had advanced in value from one hundred to one hundred and fifty per cent., this fourth of the profit may be assumed to be one-eighth of the value of the lands. If this value is assumed to be \$60,000, the fourth would be \$7500.

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There was also a mortgage for \$5000 on part of these lands, given or assumed by Josiah, with interest in arrear on it, besides taxes due and in arrear at his death, which, at this valuation, would reduce the half belonging to Eckley to about \$26,000. One John G. Hewes had recovered a judgment against Eckley, in the Supreme Court, for \$1737.54, which was an encumbrance on his share, and would reduce its value to near \$24,000.

If the value of the whole in October, 1867, is assumed to be \$56,670, the lowest estimate by any witness for the defendants, the value of Eckley's share would be about \$22,500 at the time it was conveyed to the defendants for \$15,000, or \$7500 in excess of the price allowed. This is double the amount of the debt due to the complainants. This fact, in connection with the fact that this conveyance was made after the complainants' claim was placed in the hands of their attorney for collection, and while the correspondence was going on between him and Eckley about the matter, and while the attorney was "holding on" for a few days at Eckley's request, in which, as he wrote to the attorney, he thought the matter could be adjusted, seems to me sufficient proof that this conveyance was made to defraud the complainants—especially as Eckley took advantage of the delay he got from the attorney, under the false pretence of adjusting the matter, to convey this property to the defendants. The suit was commenced the day after the conveyance, and the matter is in the same condition as if the conveyance was made immediately upon suit begun, which is always a badge of fraud. As to \$7500 of the value of this property, it was a voluntary conveyance to the defendants without consideration, and to that extent it operated as a fraud upon the complainants, whether there was any intent to defraud or not, even upon the assumption that both parties, at the conveyance, supposed that it was a fair price for the property.

The conveyance must be held void against the complainants, and the lands must be sold to satisfy their judgment.

Brewer v. Day.

BREWER vs. DAY.

The whole equity on which the injunction is founded being denied, and the complainant having an adequate remedy at law for the grievances stated in the bill, if they exist, injunction dissolved.

Mr. Gilchrist, Attorney-General, for motion.

Mr. R. P. Wortendyke, contra.

THE CHANCELLOR.

The injunction issued in this case was to restrain the defendant from preventing the complainant from doing work on Day's premises as florist and gardener, and from ejecting him from a dwelling-house in which he had placed him and his family, during the contract entered into for taking charge of defendant's green-houses, by an agreement made at the time of the contract. The bill alleged that the complainant had entered on his duties, and was discharging them in good faith, and that Day, without cause, had discharged him, and was about to put him out of the premises and the dwelling-house.

The answer admits the agreement, but denies that the complainant was discharging his duties, or that there was no good cause for his discharge, and states, and specifies in what things he did not discharge his duties, and also states several causes, which, if true, are sufficient to justify the defendant in discharging the complainant from his employment, and putting him out of one or two rooms connected with the green-house and garden in which he was employed. In these matters the answer is responsive to the bill, and for the purposes of this motion must be taken as true.

The whole equity on which the injunction is founded being thus denied, the injunction must be dissolved. The complainant has an adequate remedy at law for the grievances stated in the bill, if they exist, and there is no reason for retaining the injunction after this denial.

Millard v. Merwin.

MILLARD vs. MERWIN and others.

A contracted with B to convey to him a lot of land, and to assure the title in fee simple, free from all encumbrances, with general warranty and the usual full covenants; and further, that he would assist B in defending suit at that time pending on a lien claim, B agreeing to pay all the expenses of defending that suit. That suit was discontinued. In another suit arising out of this claim, judgment was given therefor, through the failure of A to defend the suit, and the judgment declared a lien upon the premises. *Held*, that B was entitled to a conveyance free from the lien by the judgment, and that A must pay the lien, or allow the amount to be deducted from the contract price still due.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Linn, for complainant.

Mr. Scofield and *Mr. J. S. De Hart*, for defendants.

THE CHANCELLOR.

The defendants, Merwin and wife, made a written contract with the complainant, on the 16th of February, 1869, to convey to him a tract of land in Bergen City, belonging to Mrs. Merwin, for \$6000, of which \$600 was paid at the contract, \$2400 was to be paid, and was paid, in thirty days, and the remaining \$3000 was to be paid in sixty days, upon delivery of the deed.

The suit is to compel a specific performance of that contract. The defendants say they are willing and ready to perform it according to its true meaning and intent, and the only question is as to its true construction as to a building lien existing or claimed to exist on the tract. The complainant contends that the defendants are bound to convey, free from that lien, and with full covenants of title, and against all encumbrances. The defendants, on the other hand, contend that the true construction of the article is, that he complainant is to assume that lien if it exists, and to make his title subject to it.

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The written contract provides that the deed shall convey and assure the title in fee simple, free from all encumbrances, and shall contain a general warranty and the usual full covenants; and it nowhere expressly provides for any exception as to the lien claim. The defendants claim such exception arises by implication from the other provisions, and the circumstances of that claim then existing, and the verbal understanding of the parties regarding it.

Wortendyke and Baptis, two other defendants, had, by agreement with Merwin, without the consent of his wife in writing, erected a building on this tract belonging to her, and had filed a lien claim against him as builder, and Mrs. Merwin as owner, in which the last item charged was on May 6th, 1868. On this a summons was issued October 16th, 1868, and the suit discontinued June 18th, 1869.

The contract with complainant provided that Merwin and wife were to assist him in defending the suit at that time pending on this lien claim; he, in consideration thereof, agreed to pay all the expenses of defending that suit, which had accrued or might accrue. Merwin and wife also agreed to assign to him the contract with Wortendyke and Baptis, and all benefits thereunder, when the deed should be delivered. Wortendyke and Baptis claimed that about \$1800 was due to them on the contract, and Merwin claimed that about that amount was due from them to him, under a provision in the contract that he should be allowed \$10 for every day that the building was not completed, after the time fixed in the contract.

The provisions in this contract of sale cannot, in my opinion, be construed to imply an agreement that the warranty against encumbrance should not include that lien claim, or that the complainant should take title subject to the risk of that claim. Nor do the circumstances attending the contract give any aid to that construction. It is clear that a building erected by Merwin on the land of his wife, without her written consent, would not at that time, or prior to the act of March 17th, 1870, create a lien in favor of the

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mechanics. Both parties had taken advice, and knew this to be the law. Merwin so stated to Millard, but he wanted to be clear of the trouble and expense of the litigation. Millard agreed to bear the expense, but required that Merwin should aid in other respects. This sufficiently accounts for both these provisions in the written agreement; and these circumstances do not aid in making them seem inconsistent with the provisions requiring the title to be free from encumbrance. There was no encumbrance, only a lawsuit.

Nor would the parol agreement set up in the testimony of Merwin, that Millard expressly agreed to take subject to this lien claim, have any effect to change the contract, even if clearly proved. It contravenes the express stipulation of the contract, and no parol agreement can be received for that purpose. Besides, this parol agreement is expressly denied by Millard, and no one but Merwin testifies to it. Were it admissible, it is not sufficiently proved.

Wortendyke and Baptis became bankrupts, and their assignee, the defendant Kimball, filed a petition in the District Court of the United States for this state, to have that lien claim established as a valid lien on this property, and also for judgment against Merwin and wife and Millard for the amount. Upon this petition, an order for Millard and Merwin and his wife to appear on the 2d day of May, 1871, was made and duly served upon them. And the court having assessed the amount due from Merwin at \$1832.56, and the amount due to him for penalties at \$375, gave judgment against Merwin and wife and Millard for \$1457.56, with interest from March 1st, 1868, and declared it to be a lien upon the premises.

At the date of this petition no lien existed against these premises for this claim. The fact that there was no written consent of Mrs. Merwin, would prevent and defeat it. But besides this, the act by virtue of which alone this lien exists, declares that the lien should not be enforced except in a suit upon a summons issued within one year after the date of the last item in the claim filed, and that the want of such sum-

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mons should discharge the lien. The District Court would not have given the judgment that was entered if defence had been made. No defence seems by the record to have been made. And the judgment of that court created a lien; while it stands, the lien exists.

Millard was not the owner of the property, and was not bound to defend it; against that judgment Merwin and wife ought to have defended it, if they desired to protect the property from a claim against which Merwin personally had no defence. Nothing in the contract, even by implication, bound Millard to defend this suit; the contract only regarded the lien suit then pending.

There were several attachment suits pending against this property, which caused delay and perhaps excused both sides from performing the contract at the particular times required by it. But in February, 1870, after these obstacles were removed, new negotiations were entered into, and the complainant tendered the money and demanded a deed. Merwin had a deed prepared and executed with full covenants, which was satisfactory to and would have been accepted by the complainant. But he, after some parley, declined to deliver it, still claiming that the complainant should assume this lien. There was no alternative for the complainant but to abandon his contract or to bring this suit for its performance.

The complainant is entitled to a decree for the specific performance of this contract. The defendants Merwin and wife must pay and discharge the lien created by the judgment of the District Court, or allow the amount to be deducted from the amount of the contract price still due, and execute a deed with full covenants as provided in the contract, to the complainant.

Hampton v. Nicholson.

HAMPTON vs. NICHOLSON and others.

1. A tenant for a term of years under a will released her term to the executor, and authorized him to sell the premises in the manner directed in the will. The testator had directed the executor to sell at the expiration of the term, or at the death of the tenant, before. The tenant, being advised that the executor had power to convey the premises, upon the surrender of her term, purchased them, paid the price, and took a deed therefor. While occupying the premises she had paid off a mortgage, given by the testator, and taken an assignment of it. The testator was also otherwise in debt to the tenant. *Held—*

1. The deed to the tenant is void. 2. The deed being void, the tenant's right to enjoy the premises is not divested, unless the release has that effect. 3. If the release has any other effect than merely to enable the executor to make sale before the expiration of the term, the tenant is entitled to have it cancelled and delivered up. 4. The premises not having been sold, the tenant is entitled to no relief against the release. The testator's heirs not being privy to it, they can take no title through it. 5. The tenant is not entitled as against the executor, to be subrogated to the rights of creditors whose debts were discharged with the money paid for the premises. Those debts were actually paid and discharged by him as executor for the estate, and cannot be recovered from him.

2. When a mortgage has been cancelled without actual payment, on a mistaken supposition that a deed taken for the mortgaged premises merged and satisfied it, and a debt due from the mortgagor to such grantee has been given up and discharged on the belief that it was satisfied by the amount due for the conveyance, the canceling and satisfaction being entirely without consideration, a court of equity will set it aside and declare the debt a subsisting one. But the bill presents a different case.

3. Bill may be amended according to the fact, after hearing, on application before decree for that purpose.

4. A court of equity will sometimes aid the defective execution of a power, but will never confirm a sale made without any power.

5. The general doctrine is, that for mistakes in law, neither courts of law or equity give relief, though it has been done in equity in a few exceptional cases, under circumstances that do not exist here.

6. A purchaser who accepts a deed by which no title is conveyed, where there is no mistake or misrepresentation as to facts, and no fraud and no warranty of title, has no redress at law or in equity.

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Argued on final hearing, upon bill, answer, and replication.

Mr. P. L. Voorhees, for complainant.

Mr. Pancoast, for defendants.

THE CHANCELLOR.

Joseph Mason, of Haddonfield, died April 15th, 1865. By his will he directed that the complainant should be allowed to occupy his homestead for ten years from the day of his death, she paying the interest on a mortgage for \$500, held by Samuel Richardson, on the premises, and paying the tax and keeping the premises in repair during the term. He directed his executor at the expiration of the term, or at the death of the complainant, before its expiration, to sell the premises at public or private sale, and out of the proceeds to pay the mortgage. And after the settlement of his estate in the Orphans Court he disposed of the balance as follows: He directed \$400 to be invested, and the interest to be paid to his sister, Susan Barton, during her life, and at her death the principal to be divided among her four children. He directed the sum of \$500 to be invested, and the interest used for the maintenance of his niece, Naomi Mason, during her life, and after her death the principal to be divided among the children of his two sisters. He gave any balance that might remain of his estate to the children of his two sisters, Susan Barton and Mary Hunt, and one-half to the children of each.

By the inventory filed, the personal assets of the testator were \$220.16. He held a note of the complainant for \$100, and owed her \$418 for moneys paid by her as his surety. Nicholson, the mortgagee, demanded payment of the mortgage for \$500, and the complainant, on the 25th day of December, 1865, paid to him \$522, the amount of principal and interest due, and took an assignment of it.

The complainant, being desirous that the other legatees

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should have the benefit of the bequests to them before the expiration of the term of ten years, for this purpose, on the 26th of March, 1866, executed a deed to the executor, releasing her term and authorizing him to sell in such manner as directed in the will, and to the same effect as if the term was ended; provided, that she should not be subject to any rent for the property from the date of the deed of release, until it should be sold and conveyed by the executor.

The executor, on the 19th of June, 1866, agreed to sell and convey the premises to the complainant for the sum of \$1600, and she being advised by counsel, and believing that he had power to convey the premises upon the surrender of her term to him, agreed to purchase at that price, and a deed was executed to her, and she paid the price to the executor and received his deed for the premises. She afterwards, in May, 1868, cancelled her mortgage on the records, supposing that it was merged by the conveyance to her.

The executor had his final account allowed by the Orphans Court of the county of Camden, by which the balance of the personal estate, and the proceeds of the sale of the homestead after payment of debts and expenses, was settled to be \$1010.80. Out of this he invested \$900, as directed by the will, and retains the balance to be distributed according to the will.

Susan Barton having died, her children claim the sum of \$500, invested for her benefit. Naomi Mason is still living.

The executor, Zebedee Nicholson, and the children of the two sisters of the testator, and the heirs of such as are dead, are made defendants.

The bill prays first, that the defendants may be decreed to execute a conveyance to the complainant, to confirm the deed given to her by the executor; or, if that deed shall be held void, that the executor come to an account with her, and that she may be placed in the stead of the creditors of the testator, whose debts have been paid by the executor with the moneys received from her for the deed to her, and that she may be subrogated to their rights, and that the executor may be de-

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creed to take proceedings for the sale of the lands for the payment of these debts, including the sum of \$300 due to her for money paid by her as surety, and the sum of \$500 due on her mortgage, and that the mortgage may be declared a subsisting lien; and that she may be declared to have a lien for permanent repairs and improvements.

It is clear that the will gave the executor no power to sell the homestead, until the term of the complainant was ended by its completion or by her death. The court sometimes aid the defective execution of a power, but I know of no case in which a sale has been confirmed when it was made without any power in the person attempting to sell. The deed to the complainant is simply void.

Four of the defendants, children of testator's sisters, have answered. They admit the will and the sale, but deny that the price was the value of the premises, which they allege was at least \$2000 at the time of the sale. The others, including some infants, have not answered. The bill has been ordered to be taken as confessed against them, but no proofs have been taken to sustain any allegation of the bill as against them. As to them, it is an *ex parte* hearing without proof.

By the allegations of the bill, it would seem that the personal effects of the testator were not sufficient to pay quite all his debts and expenses of administration. About \$590 of the \$1600 paid by the complainant for the real estate, was used for that purpose.

The sale being void, did not disturb the complainant in her term of ten years. She has a right to enjoy the premises for that term, unless her release to the executor has divested her of her right. That being made to him for the express purpose of enabling him to make sale of the premises before the expiration of the term, can, if properly drawn, only be valid for that purpose. It is not before me, and I cannot adjudge what would be its effect at law; but if it has any other effect, the complainant is entitled to have it cancelled and delivered up. If given subject to the proviso stated in the bill, that she shall occupy the premises, free of rent,

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until they are sold—as they are not now sold, and cannot be until the end of the term, she needs no relief against it. The testator's heirs are not privy to it, and can take no title through it.

The conveyance made by the executor was made in good faith, and was taken by the complainant in good faith, both being advised and acting under the belief that he had power to convey. It was a mistake of law as to the effect of the power in the will. And for mistakes in law, neither courts of law or equity give relief. The grounds upon which this doctrine rests are discussed, and the authorities supporting it cited in the exhaustive opinion of the Court of Errors in New York, delivered by Justice Bronson in the case of *Champlin v. Laytin*, 18 *Wend.* 407. Such is the general doctrine, though it has been done in equity in a few exceptional cases, under circumstances that do not exist here. *Skillman v. Teeple*, *Sart.* 232. Purchasers frequently accept deeds by which no title is conveyed, under a misapprehension of the law. When there is no mistake or misrepresentation as to the facts, and no fraud and no warranty of title, they have no redress at law or in equity. The deed to the complainant is not in evidence, but it must be presumed to be the usual executor's deed, without warranty, reciting truly his power of sale.

Nor can I see how the complainant is entitled, as against the executor, to be subrogated to the rights of creditors whose debts were discharged with the \$1600 paid by her for the deed. These debts were actually paid and discharged by the executor with money received by him as executor for the estate, and which cannot be recovered from him by the complainant.

If the mortgage had been canceled without actual payment, on the mistaken supposition that the deed merged and satisfied it, and the debt of \$300 due from the testator to the complainant been given up and discharged, on the belief that it was satisfied by the amount due for the conveyance, this canceling and satisfaction being entirely without considera-

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tion, could, in equity, be set aside, and the debts be declared to be subsisting. But the bill states that the complainant paid the full sum of \$1600, the consideration of the deed, and that the executor, with this money, paid to her the mortgage debt, and the other indebtedness of the testator to her. I much doubt whether the fact was so, but I can act only upon this particular statement in the bill; it is all I can know of the transaction. If this statement in the bill is not according to the fact, but the mortgage was canceled, and the other claims given up, on the supposition that they were paid and satisfied by the amount supposed to be due from the complainant for the conveyance, on application before decree for that purpose, the bill may be amended according to the fact, and these debts decreed to be valid and subsisting.

The release executed by the complainant to the executor to enable him to convey the premises must be declared void, and the complainant be decreed to have the right to occupy the premises for the residue of the term of ten years, as directed in the will. All other relief must be denied. Costs will not be decreed to either party.

PRICE'S EXECUTRIX vs. PRICE'S EXECUTORS.

Where an executor who has had the actual management of the estate, has wasted or misappropriated the funds in his hands, and claims that he can permit a co-executor, now insolvent, to take funds of the estate, without being responsible, and has once permitted this, and such co-executor appropriated the funds so taken to his own use, a receiver will be appointed.

This was an application on part of the complainant, one of the executors of Francis Price, deceased, in a suit brought by her against the defendants, Rodman M. Price, Edward L. Price, and Zachariah Price, her co-executors, for an account. The application was founded upon the testimony taken in the cause for the final hearing.

Price's Executrix v. Price's Executors.

Mr. Garretson, for application.

Mr. A. B. Woodruff, contra.

THE CHANCELLOR.

The testator, Francis Price, by his will, gave to the defendant R. M. Price, in trust for his children, one-half of all his estate, deducting \$16,000 in pecuniary legacies, which he directed to be paid out of the half given to Rodman in trust. The other half he directed to be divided equally amongst his widow, and his son Edward, and his daughter Frances; Edward and Frances to have the principal of the one-third left to their mother, upon her death. The shares of the complainant and Frances were to be paid to trustees, and the share of Frances, at her death, was limited over to her children, infant defendants.

The complainant, and the defendants, Rodman M., Edward, and Zachariah, were appointed executors. The complainant, only, proved the will in the city of New York, where the testator resided at his death. All the executors proved the will in this state, and had letters testamentary issued by the surrogate of the county of Bergen. The defendant Zachariah Price has done nothing in the administration of the estate, except receiving \$1000 for his services in being executor. The defendant Edward L. Price has done nothing in administering the estate, except taking \$19,000 in bonds, as executor, nominally for payment of debts, but which he appropriated. He afterwards was declared a bankrupt.

The defendant Rodman M. Price has received and managed almost all the estate, the greater part of which was in New Jersey. It consisted in part of a mortgage for \$200,000, another for \$15,000, a third for \$900; some lots at Elizabeth, sold for \$13,000; and a farm at Ramapo, the title of which was in the name of the testator, but which is claimed by Rodman M. Price to be in him, as trustee for his children.

Rodman M. Price has answered, and rendered an account.

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By this it appears, as admitted by the bill, that the mortgage for \$200,000 was disputed by the Weehawken Ferry Company, the owners of the mortgaged premises ; that a compromise was made by the executors with the company, by which one hundred and seventy-five bonds of the company, for \$1000 each, were received in satisfaction of the mortgage. These were received by R. M. Price. By the account annexed to his answer, it appears that he received from other sources, in cash, \$28,950, and paid out \$26,608.16, leaving in his hands a cash balance of \$2341.84. This account further shows, that with the bonds he paid \$6000 to counsel, for services either to the testator or the executors ; that he paid the \$16,000 legacies charged upon the half of the estate given to him in trust ; that he paid the trustee of the complainant and her daughter Frances, \$40,000 ; that he paid Edward L. Price, on his share, \$20,000, and gave him as executor, \$19,000 ; and gave to Zachariah \$1000 for his services ; and that the residue of these bonds, or \$73,000, are in his hands or unaccounted for.

In his examination as a witness in the cause he claims to hold these as trustee for his children, or rather that he did hold them as such, none of them being now held by him. He refuses to answer as to what he has done with them, on the ground that being held by him as trustee for his children, he is not bound to account for them in this suit, or to answer any question concerning them.

The \$6000 of these bonds paid to counsel must, on this application, be taken to be rightly appropriated ; so, also, the \$1000 paid to his co-executor. This leaves \$168,000 to be accounted for. Of this, E. L. Price has taken and wasted \$19,000, leaving (if R. M. Price is not charged with this sum) \$149,000 to be equally divided between R. M. Price, trustee, and the donees of the other half of the estate. If from one-half of this is deducted the legacies amounting to \$16,000, directed by the will to be paid out of his half, it leaves only \$58,500 belonging to him as trustee for his children. The other \$14,500 of the \$73,000 not accounted for,

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belong to those to whom the other half of the estate was given. This he holds, besides the \$2341 balance of cash. I do not intend to express an opinion that he is not accountable for the \$19,000, which, in one part of his testimony, he says he paid over to Edward, and in another part says that Edward took from a common depository, without his consent, although in his presence.

It appears from his own testimony that he has wasted or misappropriated the amount in his hands, and he refuses to answer how or where. If, as he claims, he can permit a co-executor, now insolvent, to take funds of the estate, without being responsible, and has once permitted this, it is sufficient cause to take from him the power of doing so again. If he is responsible, it adds so much to the amount of his deficiency.

This appears to me clearly to be such a case as requires that the further management of this estate should be taken out of the hands of these defendant executors by the appointment of a receiver, to whom all the assets of the estate shall be delivered, and to whom alone all debts due to the estate shall be paid. This only to extend to property or assets in this state, and debts due from residents here, or secured upon property in this state.

The complainant, as sole executrix in the state of the testator's domicile, to whom the administration in this state is only ancillary, will be entitled to receive all assets not administered here, to be accounted for and administered under the direction of the courts of the domicile of the decedent.

THE WEST JERSEY RAILROAD COMPANY vs. THOMAS and
others.

1. An award can not be reviewed and corrected, or set aside, at law or in equity, because it is erroneous, or because it is plainly excessive, unless the excess is clearly demonstrated, and is so great that it is not possible to account for it except by corruption or dishonesty in the arbitrators. It

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will not be set aside, as a verdict at law or a master's report in equity, because clearly erroneous and against the weight of evidence.

2. Evidence as to the cost of operating most railroads, in the absence of any proof to show the rates of fare per mile on those roads, is no guide to ascertain the net profits of a particular road.

3. The true method of calculating the value of an unexpired lease is by annuity tables; by multiplying the clear annual value of the lease by the value of one dollar per annum for the unexpired term, at the rate of lawful interest.

4. An agreement between parties to an award, in the presence of the arbitrators, at the close of the evidence, that the case should be submitted to the arbitrators upon written arguments of counsel, upon a specified copy of the evidence and the exhibits in evidence, and that the award was to be made without any further intercourse with either party, and that if the two arbitrators were unable to agree, the case should be submitted to the third arbitrator chosen, upon the same arguments and proof, without the intervention of the parties, is legal and valid. But such agreement is not proved here; and if it was, it will not justify an award made by a third arbitrator without reading the arguments of counsel, on which it was agreed to be submitted without further notice to the parties.

5. When a new arbitrator is chosen by the original arbitrators, either party has the right to adduce additional testimony and additional arguments.

6. Whether an award was ready to be delivered in time, or whether being ready to be delivered out of the state is a compliance with the condition of the submission, are questions of law to be disposed of by the court in which the suit is brought on the award.

7. A court of equity will not set aside an award because not delivered in time, when the delivery was restrained by injunction at the suit of the party making the objection.

8. Where, after an award was determined upon and reduced to writing, an injunction was served upon the arbitrators against signing and delivering it, there was no impropriety in their signing it in accordance with advice of counsel for the party in whose favor the award was made.

9. The principles stated in the opinion at the former hearing, approved. 6 C. E. Green 205.

Argued on final hearing, upon bill, answer, and proofs.

Mr. A. Browning and *Mr. Williamson*, for complainants.

Mr. P. L. Voorhees and *Mr. Cuyler*, for defendants.

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THE CHANCELLOR.

This cause has been before the court on a motion to dissolve the injunction. On the argument then had several of the questions on which the decision of the cause must rest, were discussed and decided. And on the argument now had the views expressed in the opinion then given are not controverted, but are assumed, for the purpose of this argument, to be in accordance with established principles. That opinion, reported in 6 *C. E. Green* 205, contains a statement of most of the facts in the cause, and will render unnecessary a re-statement of them, except so far as new facts have been shown in the evidence since taken.

At that time there was no evidence before the court from which corruption or partiality in making the award could be charged, and the question was not then raised. There is now evidence from which it is insisted that such corruption or partiality can be inferred. An award can not be reviewed and corrected or set aside, either at law or in equity, because it is erroneous, or because it is plainly excessive, unless the excess is clearly demonstrated, and is so great that it is not possible to account for it except by corruption or dishonesty in the arbitrators. It will not be set aside, as a verdict at law or a master's report in equity will be, because clearly erroneous and against the weight of evidence.

The arbitrators in this case were to adjudge the value of the lease put an end to by the complainants. That lease was at a rent of half of the gross earnings of the road, the lessees to pay all expenses of operating the road and keeping it in repair. The complainants insist that this unexpired term, instead of being worth \$159,437, as reported by the arbitrators, was of no value, because, by the experience of most railroads, the cost of operating a road is more than half its gross earnings. Evidence was introduced to show that this was the case, and that, although in a few railroads the expenses were less, or about thirty-six per cent. of the gross earnings, yet even this would make the amount awarded far above the value of the lease.

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In the first place, the results in other roads can be no guide to ascertain the net profits on this, unless the fare per mile on those roads is compared with the fare on this. The cost of operating a road is the same, whether the fare is two cents or five cents a mile, but the net profit in one case may be four times that in the other. It does not appear that there was any proof of this before the arbitrators. There is no such proof here. Counsel stated on the argument, that there was no proof in the case to show the rate of fare on the road of the complainants.

In the second place, there was proof before the arbitrators of the amount of the yearly net profits of this lease for the four years and eight months which had run. This was proved by the books of the lessees, and their testimony before the arbitrators, neither of which were impeached. These accounts show that the average net profits for the expired part of the term was \$26,000 yearly, and for the year of which part had expired, about \$29,000 per annum. This is after paying rent and all expenses.

Again, one of the lessees had been employed on this road as a conductor, another as engineer, and the third as a financial agent. They gave their time and personal attention to the operation of the road, and as it was only twenty-three miles long, could personally superintend everything, and thus save much of the waste and plunder that many roads submit to. The road was a middle section of a long line, and as to most of their business they were saved the terminal expenses, which are always considerable, and the expense of maintaining the organization. All salaries were paid by the complainants out of their half of the receipts.

By the agreement made by the defendants with R. D. Wood, one of the principal stockholders, and a director of the company, who negotiated the lease for them, and guaranteed to them \$2000 clear annual profit, they were to pay him one-third of the net income. If one-third is deducted from this \$26,000, and \$3000 per annum for compensation, or as wages of the defendants, who gave their time to the

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road, it would leave a balance of \$14,444 as the clear annual value of the lease itself. The value of this for fifteen years and four months can be ascertained exactly by annuity tables, which are calculated with as much certainty as the multiplication table, and of which courts will take notice as they do of that table.

By these tables, one dollar per annum for fifteen years and four months, calculated at the rate of lawful interest in this state, is \$9.22, which makes the value of \$14,444 yearly income for that term \$133,163, or more than \$26,000 less than the amount awarded. This calculation, thus made upon the evidence produced by the defendants themselves, of the annual income of the road, and made on mathematical principles, is correct, and shows the outside value of the lease, and would be sufficient to set aside a verdict or a master's report for that amount, founded upon these facts. Besides this, by a provision of the lease, it was to terminate upon the death of any one of the three lessees. This made the lease less valuable by the gross sum it would cost to insure all three lives for that amount for fifteen years and four months, which would be no inconsiderable sum.

But, although this award thus appears to me to be clearly excessive, and to a very large amount, I cannot set it aside on that account, unless under circumstances such that it must be a necessary conclusion that the arbitrators could not have made it in good faith and believing it to be correct. If they had adopted some other mode of computing value besides the annuity table, which to me appears to be the only true guide, but may not have seemed so to them, they might have arrived at the conclusion they did in good faith. If they had calculated on the basis of interest at six per cent., the lawful interest in their own state, as they most probably would, it would make more than \$9000 above the value calculated at seven per cent. Or, if they had, either by inadvertence or upon a mistaken judgment of their duty, omitted to allow \$3000 yearly for the personal services of the defendants, it would, upon the value of \$9.22 given by the

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annuity table for each dollar of annuity for this unexpired term, have amounted to three thousand times that sum, or more than the excess of the award over the above calculation. As I cannot determine that they did not award upon some such error in judgment, I must not reach the conclusion that this award was obtained by corruption or partiality. Arbitrators of high character and standing as these are, cannot be charged with corruption or partiality, because they differ from the court that passes upon the award as to the best method of arriving at conclusions, however confident the court may be in the correctness of its own.

But the most serious matter, and that most relied upon for setting aside the award, is the alleged misconduct of the arbitrators in proceeding, after the choice of the third arbitrator, to make their award, without giving the complainants an opportunity to produce evidence or to be heard by counsel before such third arbitrator. The fact that they did so proceed is shown and not disputed. And the position laid down in the former opinion in this case, that "when a new arbitrator was chosen, the complainants had the right to adduce additional testimony and additional arguments," is not questioned here.

But the defendants set up in their answer, and contend that they have established by proof, that at the close of the evidence before the arbitrators, it was there agreed, in their presence, between the parties, that the case should be submitted to the arbitrators upon written arguments of the respective counsel, to be furnished by a certain day, and upon the copy of the evidence taken by the stenographer employed for that purpose, and the exhibits in evidence; and that the award was to be made without any further intercourse with either party; and that if the two arbitrators were unable to agree, the case should be submitted to the third arbitrator chosen, upon the same arguments and proofs, without the intervention of the parties.

Such an agreement, if made, not being an agreement to confer jurisdiction, but only regarding the manner of pro-

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ceeding, is, in my view, legal and valid, and if complied with, would entirely overcome this objection to the award.

But there is a direct contradiction in the proof, by several witnesses on each side, as to the fact of this agreement having been made. The arbitrator chosen by the defendants, two of the three defendants, and their two counsel, testify, with more or less explicitness, that such agreement was made. The arbitrator chosen by the complainants, their president and superintendent, and their two counsel, testify, in the same way, that there was no such agreement. The number of witnesses on each side is equal. All of them are men of unimpeached character, and the counsel on both sides are men of high and unimpeachable character, and of very great intelligence. All, of course, may be mistaken. In such case it is a very difficult task, and not a pleasant one, to decide this question. But in this case I am not entitled to say "*non mei est tantas lites compromere.*" I must discharge my duty.

In the first place, the burden of proof is on the defendants. To sustain the award, they must show that there was an agreement to dispense with an opportunity to be heard before a third arbitrator. As in all cases where the burden of proof is undertaken, they must show it, not beyond doubt, but beyond reasonable doubt, so that the court shall feel convinced that such was the fact.

In the second place, more dependence has to be placed on the evidence of the counsel of both parties than on that of the parties themselves, or even that of the arbitrators. It was the counsel, and the counsel only, who made, or on the part of the complainants could make, the agreement. The testimony of the senior counsel for the defendants, though cautiously given, and not so directly explicit as that of their junior counsel, yet covers the whole ground, and shows that there was such an understanding, and that he understood it was concurred in by the counsel of the complainants. The testimony of the junior counsel is more direct and positive, but not more conclusive. But neither testify to any language used,

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or any act by either of the counsel for complainants, that constituted their consent or acquiescence. I can have no doubt but that they, at the time, understood them to agree to this arrangement. But in such a disagreement of testimony, the words or acts from which such agreement or acquiescence was inferred are important, as they may be such that would not be understood by the other side as an acquiescence. And at this distance of time between the occurrence and the testimony, the inference drawn by the witnesses might, and naturally would, be taken by them for the fact. On the other hand, there was no agreement unless the counsel of the complainants concurred in and consented to it. They, at the time, must have known whether they consented to it or not. Their recollection of this is of a fact, not of language. They both testify, clearly and positively, that they did not make or assent to any such agreement. The fact that the senior counsel, a month afterwards, when he first heard of a third arbitrator being chosen, answered that no proceeding could be had without notice to the complainants, and advised and instituted a suit to enjoin them, shows what his recollection must have been at that time. My conclusion from the whole evidence is, that the conversation at the time was such that the counsel for the defendants understood that it amounted to such agreement, and that the counsel for the complainants did not so understand it, nor did they intend to assent to such agreement; and that there was no such meeting or concurrence of minds as is required to constitute an agreement. Had the language used by the counsel for the complainants been proved, it might be such that would justify the defendants' counsel in the inference that an assent was intended, even if such was not the intent, and thus estop the complainants from denying it. As the case stands before me, I must conclude that both parties and their counsel have sworn to the truth; that the defendants and their counsel understood that there was an assent to the proposition, and that the counsel of the complainants did not intend to assent to it; and no

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language or act is shown that will bind to an assent not intended.

But if this agreement was clearly proved, it will not justify an award made by a third arbitrator without hearing or reading the proofs or the arguments of counsel, on which it was agreed to be submitted without further notice to the parties. I do not see any cause of complaint on the ground that the evidence was not submitted to or read by the third arbitrator. He read the stenographer's copy of the testimony. The printed railroad reports were shown and offered to him. He was familiar with their contents, and had a tabular statement of the results drawn from them. And having read the written testimony, he might have concluded, and I think he would have rightly concluded, that this case was to be decided by the proof of the net profits which had been realized on this road under its peculiar situation, and not by those realized on other roads.

But it is clear that the arguments of both the counsel for the complainants were not submitted to or considered by him. The arguments of both counsel for the defendants were printed, and were submitted to him. A part of the argument of the senior counsel of the complainants was printed, and was submitted to him; but the part of his argument that was written, and the argument of the able junior counsel for the complainants, which was in writing and not printed, was not submitted to or read by him. Both had been submitted to and read by the two original arbitrators. He testifies that he read the printed arguments, but has no recollection of any written arguments. The original arbitrator, who had these two written arguments, says that he took them with him to one of the meetings with the third arbitrator, but that they were not used or read, and that he took them away with him, and that he retained them until after the award.

If refusing to hear the parties or their witnesses is such misconduct in arbitrators as will set aside their award, then to hear the counsel of one party in full, and those of the other only in part, or not at all, is greater misconduct, and is

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sufficient reason to set it aside. Nor is this a mere technical or formal objection, especially in a case like this, in which the arbitrators have come to a conclusion that appears wrong, although such as cannot be corrected here. If the third arbitrator had read and considered in full the arguments of complainants' counsel, he might have been shown, and avoided the errors into which they appear to have fallen. For these reasons, the award must be set aside on the ground of misconduct in the arbitrators. This misconduct does not, in the slightest degree, reflect upon the character or integrity of either of the arbitrators, but consists in their disregarding certain requirements of law, of which they were probably uninformed. Mr. Baird proceeded in the absence of the complainants, under the understanding, as testified to by him, that they had agreed that he should do so. Mr. Wilder did not know that there were any other arguments to be considered than the printed arguments which he had received. And Mr. Kenney, who had these written arguments, and should have delivered them to Mr. Wilder, no doubt omitted to do so through inadvertence, or from the impression that Mr. Wilder's opinion was so firmly made up that they would have produced no effect.

The questions, whether the award was ready to be delivered in time, or whether being ready to be delivered out of the state is a compliance with the condition of the submission, are questions of law, to be disposed of by the court in which the suit is brought upon the award. Whatever disposition might be made of the question at law, a court of equity would never set aside an award because not delivered in time, when the delivery was restrained, as in this case, by injunction at the suit of the party making the objection. The advice given to the arbitrators by the counsel of the defendants, that an injunction against signing *and* delivering an award, did not restrain them from signing if they did not deliver, and that they not only might, but ought to sign it, was wise and judicious. After their award was determined upon and reduced to writing, there was no impropriety in the arbitrators taking

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advice from the counsel of the defendants as to the effect of the injunction upon their action. Their judicial duty was at an end, and the defendants had an important interest in the correctness of their proceeding.

THE PENNSYLVANIA RAILROAD COMPANY AND THE
UNITED NEW JERSEY RAILROAD AND CANAL COM-
PANY *vs.* THE NATIONAL RAILWAY COMPANY and
others.

1. The franchise of the Camden and Amboy Railroad and Transportation Company, to perfect an expeditious and complete line of communication between the cities of Philadelphia and New York, and to build across the state a railroad, to be part of that line, is exclusive against all but the state and those upon whom the state has conferred it.

2. Any railroad over the state, wherever built, if built for and adapted to be part of a through competing line between said cities, is unlawful and liable to be enjoined, unless authorized by legislative enactment.

3. No authority is conferred by any or all of the charters together, of the several New Jersey corporations co-defendant with the National Railway Company, to build a road across the state, to be used for part of a competing line between the cities of Philadelphia and New York, and the attempt by the defendants to build such road is in fraud of the rights of the complainants, and will be enjoined.

4. The Pennsylvania Railroad Company, lessees of the works and franchises of the United Companies of New Jersey, by their failure to have their lease acknowledged or proved, and lodged for record with the secretary of state within thirty days after its execution, as required by law, are not thereby disentitled to an injunction to stay the threatened acts of the defendants. The lessors and lessees having together the whole legal ownership of the rights to be protected, are properly joined as complainants. The property to be protected belongs to the stockholders whom the complainants represent; and the defendants being wrong doers, cannot set up the alleged uncertainty of legal relations between the complainants, to justify their own wrongful acts, or to prevent the appropriate relief.

5. The rule is well settled and of the highest importance, that legislative grants to private corporations are to be strictly construed.

6. The franchise of taking tolls upon public ferries, bridges, or highways, is a part of the sovereign prerogative, to be obtained only by grant. Railroads for popular use and for tolls are *publici juris*.

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This was an application for an injunction to enjoin the National Railway Company from proceeding further in the construction of their railroad across the state of New Jersey, intended to be used and operated as part of a through line between the cities of New York and Philadelphia. The argument was had upon a rule to show cause why an injunction should not issue pursuant to the prayer of the bill.

Mr. Williamson, Mr. Stockton, and Mr. Cuyler, for complainants.

Attorney-General Gilchrist, Mr. Shipman, and Mr. C. Parker, for defendants.

THE VICE-CHANCELLOR.

This suit is against nineteen defendants. Seven of them are incorporated companies, and twelve of them are some of the directors or stockholders. One of the corporate defendants, the National Railway Company, is a corporation of the state of Pennsylvania, and the other six are corporations of New Jersey. They are: The Peapack and Plainfield Railroad Company, the Elizabeth and New Providence Railroad Company, the Millstone and Trenton Railroad Company, the New Jersey Trust Company, the Narrow Gauge Railway Company, and the Stanhope Railroad Company. Under their respective charters, and under contracts of consolidation and lease, the defendants are co-operating in, and have begun the construction of a series of railroads in this state, to form across it a continuous road, to be part of a through line of communication between the cities of New York and Philadelphia.

The complainants are the United New Jersey Railroad and Canal Company, a corporation of New Jersey, and the Pennsylvania Railroad Company, a corporation of Pennsylvania. In the first of the corporate complainants are included and consolidated the companies formerly known as the Delaware and Raritan Canal Company, the Camden and

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Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company. The roads, canals, property, and franchises possessed, operated or held by these three corporations, were, before their consolidation into the above named United Company, leased and transferred by them to the Pennsylvania Railroad Company, for the term of nine hundred and ninety-nine years. By virtue of the possession and leasehold interest held or claimed to be held by the latter corporation in the demised property, and of the reversionary interest therein of the former, both are made complainants in the suit. As such they have three lines of communication between Philadelphia and New York. The first by ferry from New York to Jersey City; thence by railroad through Newark and New Brunswick to Trenton; thence by bridge across the Delaware river; thence by railroad to Philadelphia. The second by boats from New York to South Amboy; thence by railroad to Camden, and thence by ferry to Philadelphia. The third by canal from Bordentown to New Brunswick, and effecting a complete route from Philadelphia to New York by means of the Delaware river on the one side, and the Raritan river, Staten Island Sound, the Kill Von Kull and Newark Bay on the other. A branch or connecting road from Trenton to Bordentown is also to be included.

The through route projected by the defendants begins at Philadelphia; from thence in Pennsylvania to Yardleyville on the Delaware, about five miles above Trenton; thence over the Delaware and in a northeasterly direction near to Millstone, Plainfield, and Elizabeth, to some point on the waters adjacent to or in the vicinity of New York; and thence to that city by ferry. Considerable portions of this route are yet undetermined or unlocated, but its proposed course is in general as above. It is intended to be constructed and used for the transportation of passengers and freight between New York and Philadelphia, and to compete in business with the through business of the complainants between those cities. The right of the defendants to

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build and operate this competing road is the substantial issue involved in this suit. This right is denied by the complainants, who have exhibited their bill to restrain the defendants from proceeding to execute their purpose. At the filing of the bill, a rule to show cause was obtained, why a preliminary injunction should not issue, and the rule has been argued on the bill, answers, and depositions. The argument, which occupied, with the reading of the papers, the most of two weeks, was conducted on both sides with great thoroughness, ability, and learning.

The gravamen or gist of the case on the part of the complainants, is the injury to result to their through business by the diminution of their profits from the defendants' competition. The bill asserts, in brief, that, by the law of New Jersey, the state has exclusive control over the construction and maintenance of railroads and other internal improvements within her domain. That the right to build and operate a railroad for public use, and for tolls, is a right, privilege, or franchise which the state, through the legislature, is alone able to confer. That such right, unless so conferred, cannot exist. That when conferred it is property, and, like other property, entitled to the protection of the laws. That the franchise to build and use a railroad across the state, intended to be part of a through line of communication between the above mentioned cities, has been granted to the complainants, and that none has been granted to the defendants. That the defendants, in proceeding to build their road across the state, to be used for part of a competing line, are acting without authority or right, and that their threatened invasion of the complainants' franchise, is an injury which a court of equity will restrain. Out of these allegations, and their denial by the defendants, arise the substantial and decisive questions in the cause. They are:

1. Have the complainants such a franchise, exclusive against all but the state and those upon whom the state has conferred it?

The through lines of the complainants, as heretofore

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stated, are three. One is by canal, and another by a connection of *local* roads, not originally and separately authorized for purposes of a through route. However much these two lines may have been heretofore used for such purposes, and whatever advantages they may so afford to the companies or the public, they have been little, if at all, referred to as entitled to be protected against the defendants' competition. The argument has turned upon the nature and extent of the franchise given to the Camden and Amboy Railroad and Transportation Company by its charter and supplements. The exclusive right to have one line, however, until the state shall have authorized another, will not be affected by the nature of the franchise by which the two other lines were constructed or are used.

The incorporating act of the last mentioned company was passed February 4th, 1830. The words descriptive of or defining its franchise now in question, are contained in the second and eleventh sections of the act. By the second section, the company was authorized to have, enjoy, and exercise all the rights, powers, and privileges pertaining to corporate bodies, and necessary to perfect an expeditious and complete line of communication from Philadelphia to New York, and to carry the objects of the act into effect. By the eleventh section was defined the location across the state, of the railroad to form part of the through line. It was to run from the Delaware river, at some point or points between Cooper's creek and Newton creek, in the county of Gloucester, to a suitable point or points, to be by them determined on, upon the Raritan bay. It is from this original act that the complainants derive their franchise now relied on, and termed pure and simple in distinction from special and larger ones subsequently acquired. These larger ones were expressed in later enactments, and in consideration of certain payments and agreements by the company, it was agreed by the state that it should not be lawful at any time during the company's charter, to construct without the company's consent any other railroad in this state, which should be intended

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or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the company's road. Under this contract the company's franchise was exclusive against the state itself. The state had no right to authorize a competing road. These special privileges were afterwards modified by consent of the company, and by an act of 1854 were limited in duration to January 1st, 1869, at which date they expired, so that the exclusive privileges long held by the company and known as their monopoly rights, are not now in question, and have no important bearing on this cause. The privileges now relied on are those which it is said belong to every corporate body empowered by the state to operate a railroad for public use between certain specific points, and for certain specified purposes, and it is alleged as a principle of law that any competing road between the same terminal points, if not similarly authorized, is an injury to the property of the former, for which an injunction is the appropriate and rightful relief.

The authorities, relied on by the complainants to establish this legal proposition, and its applicability to their case, are the decisions of the courts of this state, and particularly that of the Court of Errors and Appeals in the case of *The Camden and Amboy Railroad Company v. The Raritan and Delaware Bay Railroad Company and others*, reported in 3 *C. E. Green* 546. That suit was brought to protect one of the through routes in this case, namely, that by the way of Camden and Amboy, from the injurious competition attempted to be made by a junction of two roads, one running from Camden to Atlantic City, and the other from the Raritan bay to Cape May. By means of the intersection of the lawful routes of these two roads a continuous railroad line was necessarily effected between Camden and the Raritan bay, which line by means of boats at each end, could be made a complete, although circuitous, route between Philadelphia and New York. The unavailable character of this circuitous route for purposes of competition was attempted to be relieved in two ways; first, by laying the road from

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Raritan bay to Cape May, as it passed through the county of Burlington, some ten miles to the west of its proper location, and then second, by constructing a diagonal road between Atsion, a station on its line, and Jackson, a station on the road from Camden to Atlantic City. This diagonal road shortened the distance of the circuitous route, and made the shorter route so effected an efficient one for competition. The Camden and Amboy Company filed their bill to restrain the building of this cross branch and the use of the competing route, and after a protracted litigation a final decree was obtained in 1863, by which it was adjudged that the use of the connected roads for purposes of through travel and transportation, was an unlawful invasion of the complainants' rights, and such use was accordingly prohibited. In the opinion of Chancellor Green it was said, "The fact is clearly established that the railroads of the defendants are used for the transportation of passengers and merchandise between the cities of New York and Philadelphia, and are competing in business with the roads of the complainants, in direct violation of the engagements of the state, and of the rights and privileges of the complainants." The opinion and decree of the Chancellor were based upon the special or monopoly privileges mentioned above, and which were then in full force. In pursuance of his decree, the defendants were enjoined from such use of their road till January 1st, 1869, when those monopoly privileges were to end. From this decree both parties dissented, and the cause being carried by both to the Court of Appeals, was there determined in 1867. The grounds of the opinion of the Chancellor, and also the decree, so far as they went, were affirmed, but for failing to go further, and to extend the injunction beyond January 1st, 1869, and thereafter until the defendant corporations should obtain legislative permission for the use of a through route, the decree was deemed too restricted, and was consequently modified and enlarged.

"When, therefore," said the Chief Justice, in delivering the opinion of the court, "the complainants obtained from

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the state the right to establish their road, I think that by the intrinsic force of such grant, such franchise was exclusive against all persons but the state. A competing road, set up without a legislative sanction, is a fraud upon such grant, and is a plain public nuisance. The consequence is, that the case of the complainants, in my opinion, does not necessarily rest upon the express clause in their charter guaranteeing an exclusive privilege. After the 1st of January, 1869, when the effect of that clause shall be spent, the defendants, as at present constituted, will have no greater right than they now have to establish a line of railroad to compete in business with the complainants, between the cities of New York and Philadelphia."

The positions thus defined by the Chief Justice were the basis of a decree that the defendants be perpetually enjoined from ever using thereafter, under their charters then existing, the diagonal road from Atsion to Jackson, or any part of it, as a link in the line of communication between the above cities. And to provide against possible injury from the existence of the road as a de facto highway, a privilege was reserved to the complainants, if any adverse claim should be thereafter set up by reason of the existence of that road, to have the same immediately abated, or so much of it as would sever the connection it formed between the other two roads. It thus distinctly appears that the ground of exclusive right against all but the state, by virtue of the original grant, was the express ground on which the action of the appellate tribunal proceeded. It was argued in the opinion and enforced in the decision. The same doctrine was re-asserted by the Chief Justice in 1871, sitting for the Chancellor, in the case of *The Erie Railroad Company v. The Delaware and Lackawanna Railroad Company and others*, 6 C. E. Green 286. "The first wrong," he says, "of which complaint is made, is that the exclusive franchise of the complainants of possessing a railroad, and carrying goods and passengers thereon from Paterson to Hoboken, has been infringed by the defendants. The claim is that the complainants have a grant from the

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legislature to construct and run a railroad between these termini, and that the defendants have no such authority, but have established a road between these cities by a perversion and in fraud of the statutable powers conferred on them. If affairs were purely in this condition, the position would be well taken."

The case of the Raritan and Delaware Bay road is then referred to by him and approved.

In view of these opinions and this decision, my impression was strong at the close of the argument, that the questions of the existence of the complainants' franchise, and its exclusive nature against all persons without a grant, could not be regarded as open ones, and that this court was necessarily bound so to declare. By an understanding with counsel on both sides, historical and other documents referred to in the course of the argument, and relating to the companies' charters and their contemporaneous exposition, together with the printed arguments themselves, were to be furnished me for more deliberate inspection. They were not furnished until several weeks later. I have since examined them with care, and am satisfied that my original impression was right, and that, sitting in a subordinate tribunal, I must hold the decision of the appellate one to be, in this case, authoritative and conclusive.

Several points have been strenuously urged against giving it this effect. One is, that the decision, so far as it exceeded the decree of the Chancellor, was not warranted by the pleadings; was extra judicial, and therefore not decisive of the question now presented to this court. It is true that the original bill in the suit set up particularly the *monopoly* rights, and made them the grounds and the measure of the injunction that is asked for. But the answer of the Delaware and Raritan Company set up, among its matters of defence, that when those rights should expire, its through route could be legitimately used. This allegation of the answer was referred to in a supplemental bill of complaint that was afterwards filed, and in the latter bill the injunction prayed for

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was without limitation of time. In both bills, also, there was a general prayer for relief. I am of opinion that so far as the pleadings are concerned, the Chancellor would have been justified in making, in the first instance, the decree that was afterwards directed. But if my opinion on this point of pleading were different, it is a point that was adjudged by the higher tribunal. It was there settled that the precise question decided was properly presented. The decree of the Chancellor was in 1863. In 1867, when decided on appeal, there remained but two years before the monopoly rights would expire. By the disposition then made of the broader question involved, and the settlement of the true nature and extent of the original franchise, the whole controversy was concluded and further litigation avoided.

But while this difference existed in the measure of relief as originally limited, and as afterwards enlarged, there was nothing in the reasonings of the Chancellor or the legal principles he laid down, at all at variance with those of the Court of Appeals. The same fundamental principles will be found in the opinions of both. In both is asserted the doctrine that the building and maintenance of highways involve the exercise of powers that are sovereign. That the franchise of taking tolls upon public ferries, bridges, or highways, is a part of the sovereign prerogative, to be had only by grant. In both, the common law doctrine is relied on, that if one had a ferry by prescription, another ferry, erected so near it as to draw away its custom, was a nuisance. And in both, the doctrine that a railroad for popular use and for tolls is *publici juris*, is assumed as indisputable law. Reference is also made in both to the opinion of Chancellor Kent, in *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 112, where a free bridge had been erected, without authority of law, in the vicinity of a turnpike bridge, and the defendant was enjoined from the continuance of the interference, the learned Chancellor declaring that the rules of the common law relating to ferries, fairs, markets, and toll bridges, were applicable to any of these similar privileges created by statute. The reference to this case of the bridge

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was not made by the Chancellor or the Chief Justice, as I understand their opinions, in approval of the full extent of the application there made of the law. The bridge was there built over a private, and not a navigable stream. The toll-gate was put upon the bridge, and a free bridge was afterwards erected for the purposes of a local road a short distance below, and intended to open and develop the adjacent lands. Chancellor Kent held the free bridge an unlawful infringement of the franchise of the company, and in so holding, gave an extent to the turnpike company's rights by implication from their charter, which has since been denied and disapproved as incompatible with the just and rigorous rules by which implications from charters are now limited and restrained. The free bridge was held to be unlawful, not because there was no grant to authorize its erection, but because it interfered with the company's road. Had the grant been essential to its legality, the opinion of the learned Chancellor in that case would not now be open to question. The common law doctrine of the ferry, which he cited and relied on, *did* depend on the principle that a public ferry is a franchise requiring a grant from the crown. The Newburgh case was decided by Chancellor Kent in 1821. Since then, the views it contains as to implications from charters have been materially changed; but nothing in the sounder and better views since adopted, in anywise impairs the authority of his judgment in its bearing on the case now in hand. This is shown in the opinion of the Court of Appeals of New York, in *Auburn and Cuto Plank Road Company v. Douglass*, 5 *Selden* 454. The company's road there was interfered with by a road which an adjacent land owner had made on his land. The company's suit was to restrain the defendant from permitting his road to be kept open, so that it might be used by the public for travel. The Court of Appeals denied the injunction, on the ground that the company's charter could not by implication restrict the defendant's rights in the use of his lands. But it was said by the court, that if an individual or company, without authority from the legisla-

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ture, build another plank road so near as to interfere with the plaintiffs' road, and should set up a gate, and levy tolls upon the traveling public, the plaintiff, as well as the people, would have a remedy by action. The principle that such a road is *publici juris* was recognized as elementary. This principle disposes of the objection of counsel so much urged at the argument, that the franchise relied on in this suit gives the complainants by implication an easement in other lands not taken for their road. No easement is created, because no previously existing right of the land owner in his land is impaired. He cannot lose what he never possessed. When the franchise to operate a public highway for tolls is conferred by the state, it is so far a delegation of powers confided to it in trust by the people. These powers may be delegated in such form, either special or general, and with such conditions and regulations as the legislative discretion may prescribe. But, whether delegated by special charter or under general laws, they are emanations from the people in their sovereign capacity. What is not conferred is withheld, and remains in the original source. The attempt to exercise them by individuals or companies, until so conferred, can be nothing but an unwarrantable usurpation of power. This doctrine is rooted and grounded in the common law we inherit, and equally so in public policy and public expedience. It contemplates the construction and operation of railroads by the agency of corporations with their aggregated individual capital, but the corporations themselves, their franchises and roads, it aims to retain in subjection to the state, and to exercise over them a governmental control. The reverse of this relation it would be inadmissible to suppose.

Another of the several points that were urged, why the decision of the Appellate Court should not govern this case, is the alleged surrender by the company of its franchise, in pursuance of the act of 1854. The monopoly rights which the act of 1832 gave the company were co-existent with the charter. The act of 1854 was designed to secure their

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speedier extinction. It provided that after January, 1869, it should be lawful, without the company's consent, to construct any railroad or railroads across the state to compete with their business. A formal acceptance of this act was filed by the company, and is the surrender referred to. This surrender, it is said, did not appear as a fact in the Raritan and Delaware suit, and does appear in this. It is claimed that the acceptance related back to the original charter, and divested of its exclusiveness the franchise which that act created. But if it be true that the railroad is *publici juris*, it is obvious that the effect contended for would happen only by giving to the words of the act of 1854, the operation of a general enactment divesting the state to that extent of its own exclusive powers. This construction would make the act a surrender by the state, and not a surrender to it. It is clear that the only purpose and operation of the act, and its acceptance, were to release the state from its contract, and leave it free to charter competing roads at its pleasure.

As a further reason why the appellate decision should not govern this case, it was said that the franchise of complainants was exclusive only against a competing road within three miles of their own. This is based on the twenty-fourth section of the original charter. It enacts, that if the state shall authorize any other railroad across the state from New York to Philadelphia, which shall commence and terminate within three miles of the commencement and termination of the company's road, the company should be exonerated from paying to the state the duties which that act imposed. The competing road enjoined by the Court of Appeals began at Camden, within three miles of the other. This has been urged as a reason why the decree in that case furnished no rule of law applicable to this. Stress has been laid upon the use by the court of the words *such a road*, to support the idea that a road not commencing within three miles of the complainants' did not come within the scope of its decision. But the answer is, that the provision of that section relates only to a competing road ending as well as beginning within

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three miles of the terminal points of the other ; and further, that the road so enjoined did not terminate within three miles of the other, the one ending at South Amboy, and the other at Port Monmouth. It is obvious that the words *such a road*, as used by the court, cannot operate, in connection with the words of the twenty-fourth section, to limit the scope of the decision, or to discriminate in any respect that case from this. It may also be noted that the words of that section are quite consistent with the doctrine that any road to be constructed, either within or beyond the three miles, must be authorized by the state.

I am unable to perceive any principle or fact in the present case that can avail to take it out of the operation of the law in New Jersey as thus judicially determined.

The law so determined is, that the express words of the charter of 1830, conferring the franchise necessary to perfect an expeditious and complete line of communication from Philadelphia to New York, and to build across the state a railroad to be part of that line, gave to the grantees an exclusive right until the state should otherwise provide. That any road over the state, wherever built, if built for and adapted to be part of a through competing line from city to city, is unlawful, and liable to be enjoined. The defendants' road is to be built for this purpose. Its proposed route is adapted to accomplish it, and unless authorized by the legislature, is, in contemplation of law, in fraud of the rights of complainants.

This brings me to inquire :

2. Have the defendants the necessary grant ?

It is to be found, if at all, in one or more of the following incorporating acts :

1. The Peapack and Plainfield Railroad Company, approved March 30th, 1855, with its several supplements of February 29th, 1856, March 13th, 1861, and March 11th, 1864.

2. The Millstone and Trenton Railroad Company, approved April 3d, 1867.

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3. The Elizabeth and New Providence Railroad Company, approved March 22d, 1867.

4. The New Jersey Trust Company, approved April 16th, 1868.

5. An act to authorize the construction of narrow gauge railways, approved March 22d, 1871.

6. The Stanhope Railroad Company, approved March 13th, 1872.

Do these acts, or any of them, authorize the proposed road?

No rules of law are better settled than those applicable to legislative grants to private corporations. In the Delaware Bay case, 1 *C. E. Green* 372, it was said by Chancellor Green, "It is a well settled rule that public grants are to be construed strictly; and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is, that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public. The corporation takes nothing that is not clearly given by the act."

The same rule has been repeatedly expressed and enforced by the courts of this state, by those of other states, and by the Supreme Court of the United States.

In *Perrine v. Chesapeake and Delaware Canal Company*, 9 How. 192; Chief Justice Taney, delivering the opinion of the Supreme Court, said, "But the rules of construction in cases of this description as recognized by this court in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Peters 420, is this: That any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. The charter must be fairly examined and considered, and reasonably and justly expounded. But if, upon such an examination, there is doubt or ambiguity in its terms, and the power claimed is not clearly given, it cannot be exercised. The rights of the public are

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never presumed to be surrendered, unless the intention to surrender clearly appears in the law."

In *Commonwealth v. The Erie and Northeast Railroad Company*, 27 Penn. State R. 339, the Supreme Court of Pennsylvania, expressed the same doctrine as follows:

"An act of incorporation is and always must be interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation, it may do; beyond that all its acts are illegal, and the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the Attorney-General or any body else should complain against a company that keeps itself within bounds that are always thus clearly made, and equally strange that a company that has happened to transgress them, should come before us with the faintest hope of being sustained. In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation has certain privileges, show us the words of the legislature conferring them. Failing in this you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation. The doctrine is maintained by the Supreme Court of the United States, and in many states of the Union. Even in England, the justice and necessity of it are universally acknowledged and acted on. But we do not mean to discuss the subject over again. The lawyer who is not already familiar with the numerous authorities upon it, to be found in every book of reports, will probably never become so; and the citizen who does not believe it to be a most salutary feature in our jurisprudence would hardly be convinced, though one rose from the dead."

It would be easy to cite from opinions delivered in nu-

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merous cases in our own state and others, where the same rule has been affirmed with equal explicitness and emphasis.

But it is needless to do so. The foregoing will suffice to show with what strictness the doctrine is uniformly maintained. Its object and aim are apparent, and of the very highest importance. They are to prevent men from obtaining from the legislature the passage of acts without disclosing their real meaning and purpose; to protect the legislature from being misled by doubtful or ambiguous language; to permit nothing to be acquired from the public by covert and cunningly devised phrases; to compel those who ask for special privileges to say frankly and unmistakably what they mean, so that plain men cannot fail to understand what it is they are asked to vote away. The same things are meant to be secured by that part of our state Constitution, which ordains: Article 4; section 7; clause 4: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

Now, applying these principles to the six acts enumerated above, and asking the question, do these acts authorize the defendants to build a road across the state to be part of a through line from Philadelphia to New York, I cannot hesitate to answer that question in the negative. The first five of them do not remotely suggest such a purpose. On the contrary they repel and exclude it. The Peapack and Plainfield, the Elizabeth and New Providence, and the Millstone and Trenton roads are limited by their charters to certain terminal points. These points are sufficiently indicated by the names of the places in their titles. Except between points in or near to these places they cannot lawfully be built. If built in accordance with their charters they could not connect to form a continuous line.

The Narrow Gauge Company is incorporated under a somewhat general act. The beginning and ending points of the road or roads authorized by this act are not definitely

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fixed as in ordinary charters. But without adverting to the peculiar objects professedly aimed at in this act, it is sufficient to say that any road to be built under it is restricted in gauge. Its rails cannot be laid at a greater distance than three feet six inches apart. This restriction effectually prevents any road of this company from forming part of a through line. The act also provides that no road to be built under it shall be authorized to cross by bridge or otherwise the Raritan river.

Under no other act but this do the defendants claim authority for that part of their line from Millstone to and across that river, but allege that no legislative authority is needed. This allegation, we have already seen, cannot be sustained. A similar prohibition as to crossing the Delaware is contained in the Millstone and Trenton charter, and evinces the same absence of any legislative intent to grant a through route. The New Jersey Trust Company, being the fifth mentioned above, exists under a supplement of April 2d, 1869, to the original act of April 16th, 1868. The original act, as its title imports, had no relation to railroads. The supplement authorized the erection of warehouses and other buildings for the company's business in the county of Hudson, on the shore of Hudson river or New York bay, or of waters adjacent thereto, and to construct a tramway or railway from its warehouses to any railroad running through or having its terminus in the county of Hudson; from this supplement the franchise is sought to be derived for that part of the road between Elizabeth and the waters opposite or near to New York. It is plain how obnoxious this supplement is to the objection that its object is not expressed by its title. Bearing in mind the positive prohibitions as to crossing the Raritan and Delaware rivers, and the equally positive restriction as to gauge which some of these acts contain—looking also to the special and local purposes they were declared to be intended for, the proposition that they cannot be held to contemplate or authorize a continuous through road must be regarded as incapable of serious dispute.

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That the Stanhope charter does not authorize such a road is hardly less clear. Its title is "An act to incorporate the Stanhope Railroad Company." It authorizes a railroad from some point on Walkill Mountain, within three miles of Lake Hopatcong, to the Morris and Essex Railroad at Stanhope, or to some point on Lake Hopatcong. All the provisions of this act with two exceptional passages, are exclusively applicable to the construction of this short and comparatively insignificant road, and refer to no other object. These two exceptional passages are in the sixth and eighth sections. *Without* these passages the act is complete in itself, is in the customary orderly form, and its provisions are easily understood; *with* them the arrangement of parts is interfered with, and the meaning obscured. They are interjected and unsuited to the context. The second and most important of these passages, namely, that in the eighth section, is charged to have been fraudulently inserted, and not to have been brought to the notice of or voted on by the legislature; and much of the argument turned upon the two questions relating to this passage, whether first, it was competent to go behind the authenticated copy of the act, and show by proofs that the act in its present form was obtained by imposition and fraud; and second, whether if competent to do so, the evidence produced for that purpose is sufficient to demonstrate the fraud. In the view I take of the case, it is unnecessary now to decide either one of these controverted questions. My opinion is, that assuming the whole act to have been regularly passed and approved, it manifestly fails to confer the franchise for which the defendants contend. They seek to derive it from the exceptional passages in the sixth and eighth sections. The first is inserted apart from the language describing the location of the road mentioned in the title, and is appended to the enumeration of powers given to lay out, construct, and repair that road, and that road alone. To this enumeration of powers to be exercised solely upon the designated route from the Walkill Mountains to Stanhope or Lake Hopatcong, are appended the

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words: "and for the conveyance of passengers and freight to and from the terminus thereof, to and from the city of New York and elsewhere, subject to such compensation as is hereinafter provided."

It would be difficult to say, with precision and certainty, what effect, if any, can be given to these words, or what the mode of conveyance here alluded to is; but whatever may be meant by the words, how can they be said to suggest, still less to express, a legislative intent to authorize a road from the Delaware river to the Hudson, whose nearest approach to the Stanhope road is more than twenty miles distant? I think they cannot.

The eighth section entire is as follows:

"8. *And be it enacted*, That in case any owner or owners of such land or real estate shall be feme covert, under age, non compos, out of the state, or under any other legal disability which would prevent their agreement with the said company, then it shall be the duty of the said company to pay the amount of any award or report so made in behalf of any such person, into the Court of Chancery, to the clerk thereof, subject to the order of the said court, for the use of any such owner or owners, all of which said proceedings, as well under this as the preceding section of this act, shall be at the proper costs and charges of the said company, except in cases of appeal above provided for; and the said justice shall and may order and direct as to the amount of costs and charges of such valuation and appraisements, and witness fees, and as to the payment thereof in cases where an appeal is made; and it shall be lawful for the said corporation, at any time during the continuance of its charter, from time to time to unite and consolidate, as well as merge its stock, property, franchises and road, with those of any other corporation or corporations heretofore or hereafter incorporated within or without this state, and such other corporation and corporations are hereby authorized to unite, consolidate, and merge their stock, property, franchises, road, and roads with this corporation; and after such merger into this corporation, this

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corporation may from time to time lease its roads, franchises, and property, or any part thereof, to any other corporation or corporations within or without this state, and such other corporation and corporations are hereby authorized to take such lease or leases, and this and the other corporation or corporations may use and operate this road, or their own roads, or all or any of them, according to the provisions and restrictions contained in the charter of this corporation, or in the charter of such other corporation or corporations, or both; and this and the other corporations may make contracts and engagements with any other corporation or corporations, or with individuals, for operating this road, or said other roads, or parts of either or both, as well as for transporting passengers, freight, and trains over this road, and said other roads, or any part thereof, or over any road, and demand and receive for the transportation of passengers, freight, and trains over their roads, and the roads of such other corporations as are above mentioned, and over any other roads, the same rates of fare, freight, and toll as are authorized to be charged by this corporation for like services over this road; and this corporation may be known by such new name as its directors shall, by certificate filed in the secretary of state's office, declare to be its name; and to build this road, and the road of any other corporation which may lease the same, it and its lessees may make the bonds and mortgages hereinafter authorized; and it and its lessees, successors, and assigns, may exercise and possess all the railroads, franchises, and property so as aforesaid merged into it, without restriction as to the gauge of tracks, in the same manner, and with like effect, as if it had been specially created by act of the legislature of this state to exercise the same; and the legislature shall have power to alter, revoke, or annul this charter whenever the courts shall have decided it to be injurious to the citizens of this state, by reason of a misuse of the powers herein granted, and not otherwise."

The alleged interpolated part of this section, and the part on which the defendants rely, is that which begins at the

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close of the provisions for the assessment of damages for lands taken for the construction of the road from the Walkill to Stanhope. The powers involved in the general terms in which this part of the section is couched, are extraordinary and extensive. In alleged pursuance of them the six New Jersey corporation defendants in this suit entered into a contract of consolidation on the 10th of June, 1872, for the merging into the Stanhope company of all the stock, property, franchises, and roads of the five other corporations; and on the 1st of July, 1872, the Stanhope company, claiming to be vested, by virtue of such merger, with all the property and franchises vested in the said five corporations respectively, entered into a contract with the National Railway Company, whereby the consolidated Stanhope company leased to the National Railway Company all its property, franchises and appurtenances, for the purpose, as expressed in said contract of lease, of building and operating the said several railways to form a continuous line from a point on the Hudson river or New York bay, opposite the city of New York, to a point on or above the middle of the Delaware river, near Yardleyville, so as to connect with the railroad in Pennsylvania, of the party of the first part, whereby to form a continuous railroad from Jersey City, in the state of New Jersey, to the city of Philadelphia, in the state of Pennsylvania.

The legality of these contracts has been denied by the complainants, on the grounds that some of the contracting New Jersey corporations were not organized in pursuance of the terms of their charters; that the time limited in the Millstone and Trenton charter expired before the road had begun to be built, making the act consequently void. Much of the evidence, and not a little of the argument, was directed to one or both of these points. It is unnecessary on this motion to decide them; assuming them settled in accordance with the claim of the defendants, the insuperable difficulty remains that the section makes no adequate provision for a continuous road across the state, to be part of a through

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line. It does not do so expressly or by necessary implication. Whether the merger and union it speaks of be only of roads connected with the Stanhope or not, are questions which the vagueness of the terms referring to such union and merger make it difficult, if not impossible, to answer. Logic and inferential reasoning would be at fault, if logic and inferential reasoning were admissible to deal with equivocal terms. But "what is doubtful is decisively certain against the corporation." The section does not repeal or affect the prohibitions of the charters of the associated companies as to crossing the Delaware and Raritan rivers, nor can it prevail to repeal the limitation of gauge contained in the narrow gauge charter; on the contrary, the limitation is recognized as existing, and the utmost authority afforded by any legitimate construction of the words is, that companies may consolidate whose roads are of different gauge. But here again, if the words could fairly be deemed of doubtful or ambiguous import, the construction must still for that reason be adverse to the grant. So that waiving the unprecedented character of the superadded part of the section, and its want of congruity with the title and scope of the act, it adds nothing by its terms as they stand for the purposes of a through route, to the powers conferred by the several charters with which it is merged. It is powerless to change the entire purposes and objects of five several acts, to repeal their prohibitions and supply their defects. It attempts, perhaps, to do so, but the oblique and disguised methods of the attempt are insufficient for success. It apparently aims at the acquisition of privileges of indefinite duration and extent, and to secure them when acquired, against the power of sovereignty itself to repeal. There is nothing whatever in the superadded part of this section, however it be viewed, to entitle it to any exemption from the strict and salutary rules by which charters are governed. Much indeed was said at the argument of the public wants and the public demands which the through road, proposed to be built under it, is intended to meet; and the present conditions of population

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and commerce, as contrasted with the conditions existing in the state when the complainants' franchises were granted, were eloquently and forcibly presented. But it is surely needless to say that, however weighty these considerations may be, they are considerations for the legislature, and not for the courts. Courts can interpret grants, but cannot create them. If the legislative fidelity and discretion, on which their creation depends, could be supposed in any instance to be unequal to the wants and demands of the people, the remedy would not be in the judicial tribunals, but in the people themselves. The courts will not disregard or pervert or evade the just and well-settled rules of the law. Could they do so in one case, they could also in others, and, exposed to an arbitrary discretion, no property or rights would be safe.

The existence of the franchise in the complainants and the absence of it in the defendants being arrived at, the remaining points may be briefly disposed of. They are of a subordinate and technical nature.

The Pennsylvania Railroad Company is a party complainant, as before stated, by virtue of a lease for nine hundred and ninety-nine years. By an act of April 4th, 1871, all contracts for leasing, consolidating, merging, or in any manner disposing of the franchises, privileges, or any part thereof, of any corporation of this state, are required to be acknowledged or proved, and lodged for record with the secretary of state. Unless this be done within thirty days from the date of execution, it is enacted that the same shall become invalid and of no effect. The lease here was executed or delivered in September, 1871, and had not been recorded at the commencement of this suit. The defendants insist that the Pennsylvania Railroad Company, by reason of such default, are not entitled to prosecute the suit, and show no title to an injunction to stay the threatened acts complained of. There is a misjoinder, it is said, of complainants.

That a lease was actually made, that the latter company entered into possession and are operating the road, are facts

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that sufficiently appear and are not denied. The property to be protected is the property of the stockholders, for whom the complainants are trustees. Each of the complainant corporations has an interest of some kind and to some extent in the property demised, and they have, together, the whole legal ownership of the rights to be protected. The uncertainty of the legal relations between the complainants themselves, or of their respective interests in the subject matter of the suit, cannot justify the defendants in their action as wrong doers, or be taken advantage of to defeat the appropriate preventive relief. Were the suit by the lessees against the lessors, and dependent on the validity of the lease, the case would be essentially different. In that case, the doubtful title might be a ground why the intervention of the court should be refused. The rule is elementary, that all persons interested in the object of the suit must be parties as complainants or defendants. I am of opinion that the complainants are properly joined.

Nor can I find any force in the technical objections against the form and sufficiency of the allegations of the bill, nor in the suggestion that the complainants are chargeable with laches through any delay in bringing their suit. There is nothing in the nature of the delay, if any appears, which could operate as an estoppel or have the effect of acquiescence.

The case, as I view it, is unembarrassed by any questions of form, and must be decided on its substance. The complainants have a clear title and the defendants have none. The authority of the New Jersey companies to construct and operate their own local roads, as before said, is not now to be settled. The injury to the complainants will result from the through road to be built under the contract between the defendant corporations of July 1st, 1872. For this continuous through road from and across the Delaware river to or near the waters of the Hudson, there is no legislative permission, and its construction is an unlawful assumption of power.

My conclusion is, that the National Railway Company, its

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associates, coadjutors, and agents, must be enjoined from further proceeding to construct this road as part of a through line between the cities of New York and Philadelphia.

I shall so advise his Honor the Chancellor.

VAIL'S EXECUTORS vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and others.

A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so. Where the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled.

The argument was before the Vice-Chancellor, on bill and demurrer.

Mr. Williamson and *Mr. Frelinghuysen*, for the demurrer.

Mr. Vanatta, contra.

THE VICE-CHANCELLOR.

The general demurrer raises the question whether, upon the bill taken as true, any matter appears whereon the court can make a decree or give the complainants any relief.

A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so. Where the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled. 1 *Daniell's Ch. Pr.* (4th Am. ed.) 543, 584; *Mettler's Adm'rs v. Mettler*, 3 C. E. Green 273.

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The bill in this suit is for discovery and relief, and the question therefore is, whether the case as presented in it shows any equity whatever to which the defendants should be held to answer. If not, the demurrer must be sustained; otherwise it must be overruled.

The following facts appear from the bill. The complainants are the executors of Stephen Vail, deceased, and, as such, are the owners of twenty-five hundred and forty-eight shares of the capital stock of the Central Railroad Company of New Jersey, one of the two corporations who are the defendants in the suit. The stock, at its par value, amounts to \$254,800. The other defendant is the Central New Jersey Land Improvement Company, a corporation of this state. The act incorporating the latter company was approved April 9th, 1867. It was procured by the railroad company to enable the latter corporation advantageously to dispose of certain surplus lands purchased by it through a series of years, and which were not deemed necessary or desirable to be longer held, because not needed by the company for the purposes of its legitimate business. The moneys from time to time expended in purchasing these lands along or near to the line of its road, had formed part of the capital of the company, and the value of the surplus lands so purchased exceeded \$2,000,000. The object of the creation of the land company was declared in the preamble of the above-named charter, to be to dispose of these surplus lands for the stockholders of the railroad company, for whom the same were held in trust. The company was authorized to have a capital stock of \$200,000, divided into shares of \$100 each, with the privilege from time to time of increasing the same, as might be required for the purposes of the incorporation.

The railroad company, by a circular dated December 17th, 1870, gave notice to its stockholders that all the valuable lands held by it along and near the railroad had been transferred to the land company at present cost, and scrip stock of the land company received in part payment therefor, with

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\$30 credited on each share, subject to further call of \$70 on each share, in instalments to be thereafter paid.

The land company, by a circular dated March 1st, 1871, and sent to the stockholders of the railroad company, notified them that the fourth and fifth instalments of \$10 each per share on the scrip stock of that company were thereby called in, and payable on or before the 1st days of April and May respectively.

Subsequent to this notice, the directors of the railroad company sent to its stockholders their annual report, dated March 20th, 1871, wherein the following statements were made:

"The extensive and valuable lands along the line of the Central road and of the Newark branch, so far as the same were no longer necessary or desirable for the purposes of the railroad, have been transferred from time to time to the Central New Jersey Land Improvement Company, under a charter secured some years ago for the very purpose of receiving these lands when the time should come for parting with them. All the stock of the land company was held by or for this company, and as it was no longer necessary or desirable to control it, the stock was allotted, at the close of the year, among the stockholders of the Central road pro rata with \$30, or thirty per cent., credited on each share, as a representative of the profits of the year over eight per cent., and of the previous profits of which no division had been made. The remaining instalments, as called by the land company, will be paid over to the railroad company in liquidation of the balance due by the former to the latter on the purchase, and the money will be applied to the purchase of equipments, &c., for which purpose large sums would otherwise have to be raised. The value of these lands is large and rapidly increasing, and will, it is believed, return a good profit to the stockholders."

By a circular dated May 10th, 1871, and issued by the land company, the sixth, seventh, eighth, ninth, and tenth instalments of \$10 each per share on the company's scrip stock were called in, payable on the 1st days of June, July,

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August, September, and October then ensuing. In this circular, notice was given that all scrip stock on which the fourth and fifth instalments of ten per cent. each should not have been paid on or before the 1st day of June, 1871, would be forfeited. This circular was not received by the complainants till on or after the 10th of said June; and they were apprised on or about the day last named, by said company, that the time for forfeiture by reason of non-payment of said instalments, would be extended to the 20th day of said month.

The complainants have not paid said instalments, or any of them, and on the 17th of said June filed their bill for an injunction, discovery, and relief. The threatened forfeitures were thereupon enjoined.

There is one matter presented by the facts set forth in the bill, of which an outline is as above, which, it seems to me, must operate to overrule the demurrer. It is the threatened taking from the complainants of their portion of the undivided earnings—or, in other words, of the thirty per cent. of the value of the surplus lands. The shares allotted to the complainants were five hundred and nine and three-fifths. Their par value was \$50,960. They represented so much actual value at their "present cost" of the surplus lands transferred to the land company. This appears from the directors' report. An amount equal to thirty per cent. of this latter sum had been retained by the directors of the road company from the earnings of previous years. It was undivided profits, and was the sum of \$15,288. It was in the discretion of the directors whether these earnings should be paid to the stockholders or retained for the better prosecution of the company's business. It does not appear in what form these earnings were retained, whether distributable or not. The directors appear to have proposed retaining permanently these earnings, and in lieu of paying them directly to their stockholders, to provide a plan by which an equal amount would be paid to the stockholders by the land company, when that company should sell the lands. For this purpose they allotted the scrip stock, and by crediting thirty per cent. on it,

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and so giving to their stockholders for seventy per cent. what was worth one hundred per cent., and, as the directors supposed and declared, probably worth more, the stockholders of the railroad company who should choose to pay the seventy per cent. would get back the one hundred or more, and thereby receive the dividend of thirty or whatever larger sum the expected profits of the land company might be.

The statements of the defendants' counsel at the argument in explanation of the company's scheme, furnished facts which, if admissible for me to consider on this motion, might modify the above conditions of the case as presented by the bill. But upon this demurrer I must be restricted exclusively to the case as the complainants' bill presents it, and I put my conclusion that the demurrer must be overruled and that the defendants must answer, upon the objectionable and inequitable feature of the arrangement above set forth, by which, so far as these complainants are concerned, \$15,288 worth of their property is proposed to be taken from them, unless they shall advance the sum of \$35,672 to purchase stock in a new corporation, having, it may be, the same directors and officers as the other, but separate and distinct in its existence, purposes, and interests. Why this arrangement was so made does not clearly appear. And I am unable to see how, without a justifying explanation of it by the defendants, I can assume it to be a rightful exercise of the legitimate and undeniably large discretion necessarily delegated to the directors in the management of the corporate property and business. The arrangement, it was said, was an impartial one, and put all the railroad stockholders upon the same footing. But this circumstance does not prevent it from being unjust and illegal. Granting that none of the other objections urged against the general scheme are good, and assuming that these lands were properly exchanged for the land company's stock, and that the stock could properly be sold by the road company for the best price it might bring, or be allotted in whole or in part among the latter company's stockholders in proportion to their shares, still

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the point remains that, because the complainants would not purchase this scrip and become shareholders in a new corporation, they lost not simply the profits that might arise over and above the par value of the scrip, but the \$15,288 of their property which the directors, as their trustees, and without their consent, had transferred to the land company, and which, on being forfeited, went exclusively to the latter company to swell the profits of its members. This arrangement and its result I must hold to be beyond the powers which, as trustees, the directors of the company possess. Unexplained and on its face it seems adapted to the interests of the land company, and not to those of the road company in which the complainants' capital is invested.

Under the rules before cited as applicable to general demurrers, the equity thus presented makes it necessary for the defendants to answer fully, and in this view I shall express no opinion upon the other points insisted on by complainants. The defendants' answer may so far modify the case as at present exhibited, as to render it better to dispose of it on the precise grounds of controversy it shall be found finally to present.

With the clear conviction I entertain of the complainants' equity in the single matter above stated as the case now stands, I see nothing in any delay alleged against them to disentitle them to the aid of the court.

The demurrer must be overruled, with costs.

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CHEW'S ADMINISTRATOR vs. CHEW'S ADMINISTRATRIX and others.

Bill to foreclose. Defence, that the mortgagee did not intend to enforce the mortgage, but meant that it should be canceled at his death, not established. The paper alleging to have been executed for that purpose is not produced, nor its contents shown with distinctness and certainty.

Chew's Adm'r v. Chew's Adm'r.

This cause was argued before the Vice-Chancellor, on bill, answer, and proofs.

Mr. A. C. Scovel, for complainant.

Mr. J. M. Scovel, for defendants.

THE VICE-CHANCELLOR.

¶ The bill is filed to foreclose a mortgage for \$833.50, dated August 17th, 1857, made by George W. Chew, and Charlotte S., his wife, to Jonathan Chew. The mortgage is payable by its terms in one year from date, with interest, payable quarterly.

George W. Chew died in 1862, and his father, Jonathan Chew, died in 1864. The suit is by the administrator of the mortgagee, against the administratrix and infant children of the mortgagor. The mortgage was given to secure a part of the purchase money, or price of the mortgaged premises, which were sold and conveyed by the father to the son, by deed of even date with the mortgage.

The defence set up by the answer is, that the father did not intend to enforce the mortgage, but meant that it should be canceled at his death. Several witnesses have testified to conversations had by them with the father in his lifetime, both before and after the death of his son, in which he signified that he meant to make provision to that effect; but the proof is not sufficient to show that such provision was ever made. He may have intended to do so, but he never did, so far as appears. The evidence is that he caused a writing to be drawn, and that he executed the writing, whereby some disposition of the mortgage debt was made in favor of his son's family, but the contents of the writing are not shown with distinctness and certainty; nor does it appear that the writing, whatever it was, was ever delivered. He held it himself, and probably destroyed it prior to his death, as it has not been produced, and was not seen by any one, so far as appears, after it passed into his possession from the scrivener who drew it.

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I find nothing whatever in the evidence to establish the defence, or to prevent the complainant from collecting the amount due upon the mortgage.

There must be a reference to a master to compute the amount.

MATTHEWS vs. EVERITT and others.

1. A mortgagee who knows that a prior encumbrance exists, or a concurrent legal encumbrance entitled to be a prior lien, will not be permitted by his act of registry to gain priority over the other for want of registry.

2. The statutes regulating the registry of deeds are statutes of notice. They are to prevent frauds and wrongful priorities, and not to encourage or to shield them.

Argued before the Vice-Chancellor, upon bill, answer, and proofs.

Mr. A. V. Van Fleet, for complainant.

Mr. Kingman, for defendants.

THE VICE-CHANCELLOR.

This is a foreclosure suit, and the matter disputed in it is the order of priorities between the three mortgages mentioned in the bill.

Alfred Everitt, the mortgagor, bought two tracts of land at a sale by commissioners to divide the real estate of Benjamin Blackwell, deceased, situate in the county of Hunterdon. In completing his purchase and taking his deed, he gave the three mortgages in controversy: One for \$3318, to the commissioners, to secure to the widow the interest of her third during her life, and afterwards the principal to the heirs; another for \$3500, to Solomon Holcomb, one of the commissioners, since dead; and the remaining one for \$1400, to Isaac Matthews, the complainant. The mortgage

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to the commissioners and the mortgage to Holcomb were both dated, executed, and acknowledged on the 2d of April, 1869. The mortgage to Matthews was dated, executed, and acknowledged on the 5th of the same month, and was duly recorded the same day. The other two mortgages were not recorded till the day after, and Matthews relies upon his priority of registry to maintain his priority of lien. He claims that his mortgage was the first one delivered, and the first one recorded.

The defendants who hold the other two mortgages deny his priority, and insist by their answer that their mortgages were executed and delivered prior to Matthews'; that he took his with notice of theirs, and that his lien should therefore be postponed.

The sale by the commissioners was on the 24th of November, 1869. The conditions of sale were in writing, and were particular and explicit. Everitt purchased two several tracts, signed acknowledgments of purchase in recognition of the conditions, and Matthews signed with him as surety for Everitt's performance. One of the tracts purchased contained eighty-two acres, and brought \$10,277.50; the other tract contained thirty acres, and brought \$1977.44. The conditions required that a mortgage should be given by the purchaser on the larger tract, for one-third of the proceeds of the whole real estate sold, deducting an old mortgage then on it. The mortgage for one-third was to secure the widow's dower, and the conditions so declared. The deed from the commissioners was to be delivered on the 31st of the following March, at the office of Nelson V. Young, in Mount Airy, who drew the conditions of sale and the acknowledgments of purchase, and acted as the scrivener of the commissioners. The amount of the widow's third was \$3318. The deed to Everitt was dated, executed, and acknowledged on the 27th of March, 1869, and was left with Young, who drew it and took the acknowledgment. Everitt had difficulty in raising all the purchase money, and in addition to the \$3318, above mentioned, arranged with one of the commissioners, Solomon

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Holcomb, for \$3500, by giving him a mortgage for that sum, which was allowed as so much of the purchase money. I think the latter fact is to be taken as sufficiently proved for the purposes of this case. Both these mortgages were dated, executed, and acknowledged, as before stated, on Friday, the 2d of April, and left with Young, who was acting for the commissioners and for Holcomb. The deed and mortgages were left with Young, pending the completion by Everitt of the terms of his purchases. As surety for such completion, Matthews was at the same time communicating with Everitt and with Holcomb in regard to the business, and on the evening of Sunday, the 4th, saw Young and told him of a conversation with Holcomb, who had scolded because the money wasn't all paid, and that he looked to him, Matthews, to fetch up what was behind on the sale. Matthews also told Young that Everitt had come short, and that he, Matthews, would have to make up about \$1400; that he had concluded to take a mortgage from Everitt for that amount, and that if Young could have it ready early in the morning he would take it right to Flemington, and that if he got started early it would plague them to get ahead of him.

Holcomb had arranged with Matthews for the making up by the latter of the requisite balance, for which Matthews was to give his note. He had also given instructions to Young as to taking this note from Matthews before delivering the deed. Matthews had been at Everitt's house that Sunday afternoon, and had arranged with Everitt to take from him the mortgage for \$1400. Early on Monday morning Matthews gave Young the note, who then took the deed to Everitt's house, and delivered it upon the latter's execution of the mortgage. Matthews took his mortgage, drove at once to Flemington, and lodged it for record. The same day, or the next, Young handed over to his principals the other two mortgages, which were duly recorded on the 6th. As between the two mortgages of the defendants, the priority is agreed by their holders to belong to that of the commissioners. The only question is, can Matthews hold his

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priority to both, or to either? My opinion is clear that he cannot, and that his mortgage should be decreed to be subsequent to each of the others.

It is not necessary to hold, in order to this decree, that the delivery of the defendants' mortgages was prior to the delivery of the complainant's. The most favorable view for the complainant in regard to delivery of which the evidence admits, is the view that the three mortgages were delivered, in a legal sense, simultaneously with the delivery of the deed. In respect to this, Young was the agent of the commissioners and of Holcomb, and as to this point delivery to him was delivery to them. There will be no difference of rule or principle in determining priorities, whether this view be taken or the view that the two mortgages were delivered first. The disposition to be made of the priorities in such a case as this will not turn upon technical legal doctrines, but upon the solid grounds of good faith and fair dealing. There is nothing in the complainant's course in this business to make him strong in a court of equity. The statutes regulating the registry of deeds are statutes of notice. They are to prevent frauds and wrongful priorities, and not to encourage or to shield them. The reason why a subsequent encumbrancer, who knows or ought to know that a prior encumbrance exists, or a concurrent legal encumbrance entitled to be a prior lien, will not be permitted by his act of registry to go ahead of the other for want of registry, is that it would be a fraud, an unfair transaction as between honest men to permit him to get such a precedence. It is the object of the law of registry to promote good faith, and applying this test of good or bad faith, I have no doubt as to the decision I have come to. I am satisfied from the evidence that the complainant perfectly well knew, before his mortgage was drawn, that the other two mortgages were executed, and only dependent for delivery on the delivery of the deed; that they were meant to be and were the basis to the extent of their amount on which the title was to pass and the transaction to stand; that they were to be part of and essential

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to the completion of the purchase, for which completion he was bound as security, and which he had no right to circumvent; that standing in the relation he did to the commissioners and to Holcomb, with knowledge of their arrangements, and they without knowledge or suspicion of his, the scheme he planned and executed to protect himself at their expense, was a fraud upon their rights.

The evidence and legal presumptions in the case abundantly establish, in my judgment, the character of the transaction as I have given it above. The testimony of Israel Fisher, a brother-in-law of the complainant, in regard to a conversation with Holcomb a few days after these mortgages were given, is not sufficient to control or affect the inherent equities of the case. Holcomb is dead, and cannot give his version of what was then said; but admitting that the lapse of time and the relationship of the witness have in no degree varied his recollection of the precise details of the talk, I see nothing in his evidence to influence my opinion as to the decree that ought to be made. The mortgage to the commissioners is the first lien, that to Holcomb the second, and that to Matthews the third.

I advise as above.

BRINKERHOFF vs. BRINKERHOFF.

1. A conveyance to a wife of her husband's property, made in pursuance of a family arrangement, after consultation, and with the approbation of the husband's mother, will not be set aside in favor of a judgment confessed by the son to the mother more than seven years after the conveyance, for claims alleged to have been in existence before the conveyance, but which she did not then mention, but allowed the settlement to be concluded and acted on.

2. A court of equity will not aid one against another who has been misled by the conduct of the former, to his prejudice.

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Argued before the Vice-Chancellor, on bill, answers, and proofs.

Mr. T. N. McCarter and *Mr. L. Zabriskie*, for complainant.

Mr. Williamson, for defendants.

THE VICE-CHANCELLOR.

The complainant's suit is against her son and his wife, but the controversy is between the mother and her daughter-in-law, the son co-operating with the mother in the object of the suit, which is to set aside a conveyance of his lands, made through a third person, by himself to his wife.

The complainant, Jane Brinkerhoff, is the widow of Cornelius Brinkerhoff, who, in 1850, died seized of considerable real estate in the county of Hudson, which, in 1857, was partitioned in the Orphans Court between the two children of the intestate, Cornelius and Eleanor, subject to the widow's dower.

Cornelius was married in 1857, and began soon after to sell portions of his land, for which his mother executed releases—one dated September 1st, 1858, for the consideration of \$4333.33; another, April 30th, 1860, for \$4666.66; and another, July 6th, 1860, for \$2000.

By deed of December 7th, 1863, Cornelius conveyed to his father-in-law, George C. Perry, all his remaining lands, and on the same day Perry and wife conveyed the same lands to his daughter, Cornelius' wife. Two of the lots, forming but a small part of the premises so conveyed, were parcels of the land set off to him in the division of his father's estate; the remainder and larger part had been bought by himself, or taken in exchange. In the two inherited lots the widow still has her dower.

In January, 1870, Cornelius confessed judgment to his mother, for \$18,826.07, the amount claimed to be due for the principal and interest of the consideration moneys in the three above mentioned releases. No property was found by

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e sheriff, whereon to levy the execution issued on the judgment, and it is sought in the present suit to collect the same of the lands conveyed to the wife. The bill charges that the deeds to Perry and his daughter were voluntary, and without any consideration being paid for them; that the deeds conveyed all the property Cornelius then owned, and against the complainant, who was his creditor, are utterly void. It prays that the deeds may be set aside as fraudulent, that the lands may be decreed to be liable to be taken to satisfy the judgment and costs.

By an order of the court the defendants have answered separately, the son admitting the charges of the bill, the daughter denying them and setting up matters of defence. The questions presented by the pleadings and proofs are: *first*—Is the confessed judgment *bona fide* and valid? *second*—If valid, is the complainant precluded by her conduct from enforcing it against the property in dispute?

The defendants at their marriage were young; he but little more than twenty-one, without any business or trade, and with no income to support him. He went to his wife's father's to live, and for the most part led an idle and dissipated life, addicted to drink, contracting debts, and running roughshod over his property. His father-in-law died in 1865, and from the evidence appears to have endeavored, from his daughter's marriage to his death, to benefit his son-in-law and prevent his property from being squandered. Eleanor, the sister of Cornelius, was married in 1862 to William Speer, in whose family the complainant has since lived. The conveyance to the wife of the premises in dispute, appears to have been made upon a family consultation, and as an advisable family arrangement. The defendant, Sarah, testifies that the complainant knew all about it, and was consulted in regard to it. She says: "My father and Cornelius consulted 'Cornelius' mother about it. After I received the protest from the bank, I went to Cornelius' mother and spoke to her about his note; told her he was in debt. While we were standing talking in the court yard, William Speer came in the gate;

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he asked what was the matter. I told him. He said Cornelius was over head and heels in debt; he owed John Lamb a bill. He says the only way for you to do, will be to get what property is left put into your hands. Cornelius' mother replied, it is too bad he never could take care of his property; I don't know what he would do without your father. This was in October, as the deed was made in December, 1863; it was the time we received Mr. Sisson's protest."

This statement is not denied by the complainant, or by Speer; both of whom were present when it was sworn to, and one of whom was examined as a witness.

After the death of the father-in-law, Perry, in 1865, Cornelius and wife lived with the mother of the latter till 1869, when he went with his wife to New York, where she kept house, to get away, as she says, from the liquor dealers who were following him for payment of their bills. The same difficulty seems to have been experienced there, when at the close of the year he became alarmed by the threats of his creditors, and went back to Jersey City to the residence of Speer. Soon after, and on the 7th of January, 1870, the confessed judgment to his mother was entered, for \$18,826.07. The affidavit was made by Speer, and asserts the consideration of the judgment to be the three several sums mentioned in the releases, with lawful interest from the times they were due.

It is difficult to believe that the whole of this sum was unpaid and owing at the date of the judgment. The complainant and her son both testify positively that it was. The defendant Sarah testifies positively that she had several times heard the complainant say to her father that her dower rights had been paid for. She testifies also that some of the purchase moneys named in the releases were paid, to her own knowledge, and gives the particulars of the payments. But the depositions of the three parties to the suit on this subject are none of them as reliable and satisfactory as they might be. Some of the admitted facts and circumstances of the case tend strongly against the complainant. She said nothing of the alleged indebtedness when the conveyance to the

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defendant was made. So far as appears, she never spoke of it afterwards, either to the defendant Sarah or her father, although she was well aware that they were paying off Cornelius' debts. This silence on her part for seven years or more before the judgment was confessed is a strong circumstance, in view of the peculiar condition of the family relations, to show that she did not consider the indebtedness as existing.

The first release was for \$4333.33, September 1st, 1858. If this amount was unpaid on the 24th of March, 1859, it is certainly a singular circumstance that the complainant on that day borrowed, as it is proved and admitted she did, \$2000 of Cornelius, and secured it by a mortgage to him, which she afterwards paid, saying nothing of any moneys he owed. The explanation offered of this fact is not such as to remove the doubts which the fact itself necessarily gives rise to.

The second release was for \$4666.66, April 30th, 1860. A mortgage of the same date with the release was given by Cornelius and wife to secure this amount. This mortgage was produced on the 7th of July, 1860, to the clerk of the county, receipted in full by complainant, and was canceled of record. She denies that she was paid or that she received anything for it.

On the previous day, July 6th, 1860, Cornelius and wife conveyed to a Mr. Bramhall certain lands, for which complainant gave the third release, for the consideration of \$2000. Sarah, the defendant, says that this \$2000 was paid by a mortgage for \$4000, executed the same day by herself and husband, including with the \$2000 other indebtedness on the previous mortgage, viz., that canceled on the following day. The mortgage so canceled was produced to the clerk by Bramhall, and the circumstances corroborate Sarah's account.

The \$4000 mortgage was upon premises sold to one Harney, who paid it off in November, 1864. On the 18th of that month Harney made his check for \$1075, payable to the order of complainant, and duly paid by the bank. On the

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next day the mortgage was produced to the county clerk, receipted in full by the complainant, and was canceled of record.

It is quite probable from the evidence that the business between Cornelius and his mother was done loosely, and that she acknowledged sometimes the receipt of moneys which she does not now remember to have received, and which perhaps she never did receive. But while I am indisposed to believe that she willfully mis-states, I cannot believe that during all these transactions wherein mortgages were given and discharged in connection with the very moneys now sought to be recovered, nothing in fact was ever realized by the complainant. It seems to be positively proved that she did receive the \$1075 named in Harney's check. I cannot doubt that after Cornelius left his wife, in December, 1869, the complainant was persuaded to set up this claim, which she may have been induced to regard as legal and just, but which, under other circumstances, she would not have asserted.

But I do not think it necessary to say that the judgment was altogether without foundation, collusive and fraudulent. Admit that it was good. Will a court of equity, in view of the circumstances and facts of this case, lend its aid to enforce the judgment against the premises conveyed to the wife? I think not. The conveyance was made in pursuance of a family arrangement or settlement after consultation with complainant, with her approbation, and for reasons altogether commendable. The premises when conveyed were subject to encumbrances. Cornelius was largely in debt. He had been a burden and expense to the father-in-law Perry, and by his dissolute courses was fast bringing himself, his wife, and his child, to a state of destitution. After the conveyance was made, these encumbrances and debts were paid off by Perry and the wife. The whole course of their conduct and exertions was in undeniable ignorance of any claim on the part of the mother. It seems to me in the highest degree improbable that the mother herself at that time entertained

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any thought that such a claim could ever be alleged. If she then believed she had a good claim she should have spoken before the settlement was concluded and acted on. Good faith so required; and having been silent when she ought to have spoken, equity will not permit her to speak now, to the prejudice of one misled by her silence. In the light of this familiar and equitable doctrine, it seems to me clear that the complainant has no meritorious grounds upon which she can stand in this court, and that her bill should be dismissed, with costs.

I shall advise accordingly.

VREELAND *vs.* BLAUVELT.

1. Where, under a devise to A, B, and C, and if any of them should die leaving no lawful issue, then to the survivors, A and B conveyed and released the real estate so devised to C, by deed with full covenants, including a general warranty, C has a good and indefeasible title thereto, and a contract for the purchase of such real estate will be enforced.

2. In such case, if C survived A and B, and died without lawful issue, the issue of A or B, (should any there be,) would not take by virtue of the devise. C's estate is defeasible only by his death without lawful issue, and in the lifetime of either A or B. But at that instant their estate passes by the conveyance.

3. An instrument which legally creates an estoppel to a party undertaking to convey real estate, having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor.

4. A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might consider it good, still the contract may not be specifically enforced. But there must be some debatable grounds on which the doubt can be justified.

5. The clear and settled law of the state is, that whenever, if at all, the title conferred by the will shall be determined, and the devisee before that time shall have conveyed the lands, the title conferred by the conveyance will at the same point, and at the same instant, be continued.

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Michael D. Vreeland, by his will proved October, 1830, devised lands to each of his three grandchildren, Michael, Isaac, and Margaret severally. He further devised as follows:

"Item. I further order and direct if any of my grandchildren, Michael, Isaac, or Margaret, should die leaving no lawful issue, then in such case that the survivors should have that property which I have devised to the then deceased, in equal portions, share and share alike."

Michael and Margaret, by their deed of bargain and sale with full covenants, including a general warranty, and dated July 31st, 1872, conveyed and released to Isaac the real estate devised to him by his grandfather as above.

Afterwards, Isaac duly agreed with the defendant Blauvelt to sell to him, and Blauvelt agreed to buy a portion of the land so devised and so conveyed. The defendant declined to complete the purchase, and the bill is against him for specific performance.

The defendant demurs, on the ground that the bill does not show a good and indefeasible title.

The cause was argued before the Vice-Chancellor.

Mr. G. Ackerson, Jr., for complainant.

Mr. L. Zubriskie, for defendant.

THE VICE-CHANCELLOR.

The complainant in this case took under his grandfather's will a fee simple estate, but it was not an indefeasible estate. It would not descend to his heirs or pass to his devisees or assigns, in case he should die without lawful issue, and in the lifetime of either his brother Michael or his sister Margaret. It would under the will go to them. This is admitted; and it is also admitted that if Michael or Margaret should die before the happening of Isaac's death as above, the survivor would take the whole. In such case the complainant insists

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that the deed of July 31st, 1872, would operate as an estoppel, and would pass to Isaac's assigns the title acquired by Michael and Margaret, or either of them, in consequence of Isaac's death without issue.

There can be no doubt, I think, that this insistent is correct. It seems to be expressly and conclusively sustained by the Court of Errors of this state, in *Moore v. Rake*, 2 *Dutcher* 574. The doctrine there applied and declared to be a general principle deducible from all the authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor. This being so, it is incontrovertible that in the event of Michael or Margaret being alive at Isaac's death, without lawful issue, the deed already executed by them would pass the title they or either of them should then acquire. In the contingency so far supposed the title offered by the complainant's bill is good, and the demurrer is without ground to stand on.

But it is said that the further contingency is to be supposed of the death of both Michael and Margaret before the death of Isaac, and that upon his death without lawful issue, the issue of Michael or Margaret would take by virtue of the devise. I think it perfectly clear that the issue of either Michael or Margaret would not take, and that the estate of Isaac is defeasible only upon the happening of the precise events specified in the will, viz. his death without lawful issue and in the lifetime of either Michael or Margaret. This is what the will says, and I can see no reason or principle in giving it any other effect or meaning. This plain, natural, and literal construction is expressly adjudged to be the lawful one, in *Seddel v. Wills*, *Spencer* 223.

A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might

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consider it good, still the contract may not be specifically enforced. But there must be some debatable grounds on which the doubt can be justified. These grounds do not exist here. The objection here is that the title under the will is defeasible. The answer is, that the defeasibility is fully met and remedied by the conveyance. The complainant is now vested with a good and indefeasible title. The clear and settled law of the state is, that whenever, if at all, the title conferred by the will shall be determined, the title conferred by the conveyance will at the same point, and at the same instant, be continued. In no way can the title offered by the complainant be destroyed or impaired by the defeasible character arising out of the provisions of the will.

The other points relied on by the complainant, as to the operation of the deed as a release, I think insufficient, standing alone, to support a decree; but it is unnecessary to hold them altogether without force.

I shall advise a decree in accordance with the above.

 DE RONGE vs. ELLIOTT and THE MUTUAL BENEFIT LIFE
INSURANCE COMPANY.

1. An assignment executed by the husband and wife, of a policy of insurance on the life of the husband in favor of the wife, and given as collateral security for the husband's indebtedness then existing, is a valid assignment.

2. Knowledge by the wife that her husband was in great difficulty arising out of his indebtedness and of the pendency of suits against him, it appearing that the motive to the execution of the assignment by her was the benefit to her husband by the security thus afforded to his creditor, will not invalidate the assignment on the ground of duress.

3. An assignment by the husband and wife of her reversionary chose in action, passes an interest therein *sub modo*, to become effectual only in the event of the husband and wife living long enough to enable the assignee to reduce the chose in action into possession.

4. Such assignment having no effect against the wife's right by survivorship unless the chose in action is reduced into possession, it will be

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void when the fund cannot fall into possession during his life, as where it is expressly limited to the wife in the event of surviving him.

5. The reversionary interest secured to the wife by a policy of insurance on the life of her husband, is her sole and separate property, under the fourth section of the Insurance Company's charter, and the act for the better securing the property of married women. And she has, therefore, the policy being an obligation to pay money to the wife after her husband's death, the power to assign it. Nor is it material that her interest is contingent on her surviving her husband. In that case the assignee would take it; otherwise, the children living at the husband's death.

6. That the fund created by a policy of insurance on the life of a husband, for the benefit of the wife, was created for the particular purpose of providing for the widow and family of the insured at his death, does not invalidate an assignment of such policy, made to secure the husband's indebtedness. The general act in respect to such policies did not intend to restrict them to that particular purpose, and expressly exempts them from the claims of the husband's creditors, only when the annual premium does not exceed \$100.

7. By the law of New Jersey, a life insurance policy was not prohibited as a wager policy, or condemned by general principles of expediency and morality. Before the statutory enactments with regard to such policies, they were held to be not contracts to indemnify against loss, but to pay a given sum upon the happening of a given event.

Motion to dissolve injunction. Argued before the Vice-Chancellor on bill, answer, and agreed statement of facts.

Mr. T. Runyon, for motion.

Mr. J. Whitehead, contra.

THE VICE-CHANCELLOR.

A policy of insurance for \$10,000 on the life of Louis De Ronge, was issued March 5th, 1851, to Josephine his wife, by the Mutual Benefit Life Insurance Company. The premium, payable on the 5th of March in every year during the continuance of the policy, was \$243. In consideration of the payment of these premiums, the company agreed to pay to the said Josephine the sum of \$10,000 within ninety days after notice and proof of the death of the said Louis,

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and in case the said Josephine should die before the decease of the said Louis, to pay the amount of such insurance to their children; and in case she should die without leaving issue, to pay the same to his heirs.

In June, 1871, the policy was assigned by the said Josephine and Louis to George A. Elliott as security for the payment of a large indebtedness then existing and lately created from Louis De Ronge to Elliott. The assignment was under seal, signed by herself and husband, and was delivered with the policy to the assignee. In the following month of November Louis De Ronge died, and the company, having been duly notified of such decease, was about to pay over to the assignee the amount due on the policy, when the complainant filed her bill, and an injunction was issued restraining such payment. The defendant Elliott has answered, and the cause has been argued upon its general merits on this motion to dissolve, there being no further evidence on either side to elucidate the case.

The question made by the pleadings and evidence relates solely to the validity of the assignment. The complainant insists that the assignment was illegal and invalid, and passed nothing to the defendant, for the following reasons:

First. Because the assignment was procured from the complainant under circumstances which amounted to duress.

The facts in regard to the execution of the paper are not disputed. De Ronge was indebted individually to Elliott, as was also the firm to which he belonged. In February preceding, suits had been commenced against him and against his firm, in one of which he had been held to bail. These suits were pending in June, when, at her husband's request, the complainant assigned the policy. Her statement is that she was not then aware that her husband had been arrested; she was aware that he was in great difficulty, arising out of his indebtedness to Elliott. She says he was in great distress of mind when he desired her to execute the assignment, and that to relieve him she did it. She says that she did not read it, and that it was not read to her, but she under-

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stood it to give Mr. Elliott the benefit of the policy as collateral security for the indebtedness from her husband. She does not deny that its contents and effect were explained to her, but on the contrary it appears that they were. She went from her residence in Milburn, New Jersey, to the city of New York with her husband, for the purpose of executing the paper, and understood what she was doing. She alleges no coercion, and none appears. She acted freely, influenced by a desire to relieve her husband and promote his interests. She received nothing for the assignment in the shape of money, but looked solely to the fact that her husband would be benefited by the security thus afforded to his creditor. I can discover nothing like duress in the transaction thus stated, and must regard this objection as entirely unsupported by the proofs.

As a second reason why the assignment is invalid, it is said that the fund secured by the policy was not capable of being transferred by a married woman, even with the consent of her husband, because the fund itself, not being payable in the lifetime of the husband, is a reversionary interest belonging to the wife which cannot lawfully be transferred by the husband and wife so as to bar her right by survivorship.

The effect of an assignment by the husband, with the wife's consent, of her reversionary choses in action, was held in *Hornsby v. Lee*, 2 *Madd.* 16, adversely to the doctrine on that point which seems to have been previously entertained. It was again similarly held and established in *Purdew v. Jackson*, 1 *Russell* 1, and the doctrine became settled, that in the case of reversionary rights, the assignment passed an interest in the chose in action *sub modo*, to become effectual only in the event of the husband and wife living long enough to enable the assignee to reduce the chose in action into possession.

As the husband's assignment has no effect against the wife's right by survivorship unless the chose in action is reduced into possession in his life, it follows that his assignment will be void when the fund cannot fall into possession

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during his life, as where it is expressly limited to the wife in the event of her surviving him. *Bright's Husband and Wife*, Vol. I, 87; *Richards v. Chambers*, 10 Ves. 580. '

But the above principle is inapplicable to the present case, because the reversionary interest secured to her by the policy is her sole and separate property. It is made so by the fourth section of the act incorporating the company by whom the policy was issued, which act was approved January 31st, 1845, and also by the second section of the act for the better securing the property of married women, approved March 25th, 1852. To the separate estate of the wife the husband could not, before the last named act, assert the title which belonged to him in respect to her personal property in general, whether in possession or otherwise, and the wife had the power to dispose of such separate estate as if she were unmarried. This power of disposition belonged to her as well in case of her reversionary property as of property reducible to possession. *Bright on Husband and Wife*, Vol. II, pp. 220, 221, 222; 2 *Story's Eq.*, §§ 1389, 1390, 1393, 1394.

The operation of the above act of 1852 in enabling married women to dispose of their separate personal estate, though not of their real estate, is recognized in *Naylor v. Field*, 5 *Dutcher* 287. Where once a wife is permitted to take personal property to her own use as a feme sole, she must take it with all its privileges and incidents, one of which is the *jus disponendi*. 5 *Dutcher* 288, and cases there cited.

Regarding this policy, therefore, as an obligation to pay money to the wife after her husband's death, although it be considered a reversionary chose in action, she has the power to assign it, because she holds her interest in it to her sole and separate use. Nor is it material that her interest is contingent on her surviving her husband. In that case the assignee would take; otherwise not, but the fund would go to the children, if any, living at the husband's death.

But it is said, thirdly, that the policy is not assignable, because the fund was created for the particular purpose of

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providing for the widow and family of De Ronge at his death. This objection is based upon the notion that a policy of this description is authorized only by the statute, and without the statute would be void ; that, being authorized with exclusive reference to the widow and family, it must be restricted to this purpose, and cannot be diverted from it. But this notion is a mistaken one. The legislative enactments on this point are the fourth and fifth sections of the company's charter, referred to above, and "an act in respect to insurance for lives for the benefit of married women," approved February 19th, 1851. *Nix. Dig. (4th ed.)* 548. The latter statute is in the same words with the fourth and fifth sections of the charter, and differs only in extending its operation to cases where the annual premium does not exceed \$100, while in the charter the limited amount is \$300.

The statute is as follows: 1. "It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured for her sole use the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband or his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed \$100. 2. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable after the death to her children, for their use, and to their guardian if under age."

The object of these enactments was not to give validity to a policy contract, which was previously unlawful; or, in other words, to save a policy to the wife on the life of her husband from being bad, as a wager policy, prohibited by the statute against gaming, or condemned by the general principles of expediency and morality. By the law of New Jersey, a life insurance policy was not so prohibited or con-

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demned at the time of the above enactments. The law upon this subject, as it stood before these enactments were made, is discussed and declared in *Trenton Mutual Life and Fire Insurance Company v. Johnson*, 4 Zab. 576. The policy contract was in that case held to be, not a contract to indemnify against loss, but a contract to pay a given sum upon the happening of a given event. Whether a pecuniary loss resulted or not to the policy holder from the happening of this event, was not material. There can be no doubt that in this state a wife, before the above enactments of 1851, could hold a policy on the life of her husband, and enforce the same at his death, without question as to insurable interest or pecuniary damage. The object of the enactment simply was to secure the policy to her sole and separate use, and to prevent the fund from being taken by his creditors, or those administering his estate. In the present case the premiums are admitted to have been paid by the husband, but they were less than \$300 each, and it is not perceived how, as between the parties to this suit, any point on this subject can be raised. The state of the law in New Jersey, as above explained, divests of all force or applicability to this suit, the case of *Eadie v. Slimmon*, 26 N. Y. 9, on which the complainant here relies. The decision of the Court of Appeals in that case was put by the Chief Justice, on the ground that by the common law, if one desired to insure the life of another, he could only insure the interest which he had in such other life; and that if he undertook to insure a gross sum, and the contract was not susceptible of a construction which would limit the recovery to the actual damages sustained, the contract would be void, under the statutes against betting and gaming, and that this principle of the common law, by a statute of New York, was released in respect to insurance effected by a married woman. The common law principle must be admitted, I think, to have been inadvertently mis-stated by the learned judge in that case, as clearly appears by the opinion of Judge Elmer in the case of *Trenton Life Insurance Company v. Johnson*, referred to above.

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Under the authority and reasonings of the latter case, and in view of what I conceive to be the further sanction of the case of *Landrum v. Knowles*, 7 *C. E. Green* 594, I am clearly of opinion that the third objection taken by the complainant in the present suit cannot be maintained. In *Landrum v. Knowles*, the policy held by the married woman was for the benefit of her children, and after payment by her of several premiums, was assigned by her to Knowles, who continued paying premiums till the husband died. The decree of the Chancellor, affirmed on appeal, gave to the children the reserve or accumulated fund belonging to the policy at the time it was assigned, and gave the balance secured by the policy to the assignee. The assignability of the policy was assailed by the appellants, but supported by the court, and to some extent that case is an authority applicable to this, though the payment of premiums by the assignee was a circumstance there not to be overlooked, and distinguishes so far that case from this. But the power of the married woman to assign and to divert the fund from the family of the husband, was affirmed. The assignability there recognized, cannot be ascribed to the fact of payment by the assignee of premiums subsequently due. The fund secured by the policy was decreed to be divided between the children for whose benefit it was taken out by the mother, and the assignee to whom the mother transferred it, and this division proceeded on the ground that the premium paid by the mother, had vested an interest in the children which the court would protect. To that degree the assignability was denied, for the reason that the mother was pro tanto their trustee, and ought, as far as practicable, to be incapable of disposing of their rights. But the division recognized and approved the assignable nature of the insurance contract, then remaining to be performed. It gave to the assignee, not the amount of the moneys paid by him for premiums, with interest, but the insurance fund which his payments had purchased. Had the opinion of the Chancellor, or of the appellate court, been adverse to the assignable nature of the

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policy, the equities of the case would have been met, and the assignee's equitable rights preserved by a decree refunding his advances. This would have lessened his proportion of the fund, and would support the view contended for in the case now in hand. But the decree actually made, is consistent only with the view that the mother could dispose of the insurance contract itself.

I cannot, therefore, regard the case of *Eadie v. Slimmon* as entitled to govern here. The contract in this case was made in this state, and must follow our laws. But it is further to be said, that the adjudications of other states are in conflict with the decision in *Eadie v. Slimmon*.

In *Connecticut Mutual Life Insurance Company v. Burroughs*, 34 Conn. 305, the assignee's right was denied because the married woman who assigned died before her husband, and under the statute of that state similar to ours, and under a similar provision in the policy, the fund was payable to the children in the event of her death prior to the husband's. But the principles of *Eadie v. Slimmon* were not concurred in, and the assignability of the policy was recognized rather than denied, though of course dependent for effect on the survivorship of the wife.

In *Knickerbocker Life Insurance Company v. Weitz*, 99 Mass. 157, the wife who assigned died before her husband, and the assignee did not recover. The provisions of the policy seem to have been the same on this point with the provisions of the policy here, and it was held that if the assignment of the wife passed anything, it was at most her own interest, which ended with her death.

In *Pomeroy v. Manhattan Life Insurance Company*, 40 Ill. 398, a married woman assigned \$600 of her policy of \$5000 to secure a debt of her husband, and it was held that the policy being her separate property, she could pledge it, or part of it, as security for her husband's debt, and the assignment was valid in equity, independently of the statute.

In *Emerick v. Coakley*, 35 Maryland R. 188, decided in 1872, the case of *Eadie v. Slimmon* was dissented from, and that of

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Pomeroy v. Manhattan Insurance Company approved. The assignment by the wife of a policy on her husband's life for her sole and separate use, was held valid in the hands of the husband's creditors to whom the assignment was made. The forbearance of such creditors, and the giving time for payment to the husband, was held a valid consideration for an assignment by the wife. The same doctrine is enforced in *Charter Oak Life Insurance Company v. Brant*, 47 Mo. 419, and in *Baker v. Young*, 47 Mo. 453.

My opinion is that upon authority and principle, the assignment in the present case must be sustained. It can make no important difference in favor of the complainant here that the insurance is not expressed to be payable to her assigns. The policy is a writing obligatory for the payment of money, and may be assigned at law, as well as in equity, without the word assigns.

I shall advise an order that the injunction be dissolved.

 BLAUVELT vs. ACKERMAN and others.

1. Where a trustee has kept his accounts in a negligent way, or kept no account whatever of his receipts, all presumptions should be strongly against him, and obscurities and doubts should not operate to his advantage, but adversely. But the rule will not be strictly applied when it will lead to conclusions at variance with the reasonable probabilities of the case.

2. When, from the whole case, the result at which the master arrived is consonant with the evidence as a whole, and is as probably just with reference to the fixed and known data of the case, as any that could have been reached, though the court is unable to see with what precise view of the evidence the master reached the result, his report will not be set aside.

3. When the trustee has collected and charged himself with the rents arising from the trust property, in a statement of the account long open between the parties he will be allowed interest, to accrue from the date of the yearly receipts.

4. Report corrected in respect of interest.

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5. Under the circumstances of this case, and the questionable manner in which the trust has been performed, commissions disallowed.

6. Whether the decretal orders in the suit have not settled the complainant's right to maintain his suit—*Quare*.

Argued before the Vice-Chancellor, on exceptions to master's report.

Mr. Ransom, for exceptant.

Attorney-General Gilchrist, for defendants.

THE VICE-CHANCELLOR.

In 1842, a tract of woodland of five hundred and forty-two acres, situate in James City county, Virginia, and called the Russell tract, was sold at public vendue under an order of the court of that county, and purchased by one Henry P. Banks. It was situated on what is called Ware creek, running into York river. The tract had been valued by appraisers under oath, at \$900. It was bid in by Banks for \$700. The purchase money was only partly paid, and, according to the terms of the sale, the commissioners retained the deed till payment of the balance. They did not deliver the deed till December 29th, 1849. Between the sale in 1842 and the delivery of the deed, the following occurred :

Banks sold his interest in the land to Peter Relyea, who sold his interest to James Blauvelt, Jr., the complainant in this suit. Blauvelt bought, in or about 1846, and gave in payment certain real estate in New Jersey, worth about \$3000. He soon after sold one-half his interest to Joseph Swift, for \$1850. Swift paid \$100 on this purchase, and went into possession with Blauvelt, working it as a partner. The working of it consisted solely in cutting off the wood, and selling it, mostly in New York.

In 1848, Blauvelt, who was a carman in New York, being embarrassed in his affairs, or with a view to be relieved of some difficulties with his partner Swift, made an assignment in New York where he lived, to John Ackerman, Jr., of

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Bergen, New Jersey. The assignment was dated September 28th, 1848, and was a special one under the laws of that state. The assets shown by the schedule exceeded the debts, and the assignee was the first of the preferred creditors, his claim being \$993.83. The assets consisted of (1) three credits amounting together to \$225; (2) the unpaid purchase money, being \$1750, due from Swift as above; (3) a mortgage, whose amount was not stated, and which turned out nothing; and (4) Blauvelt's half interest in the Russell tract.

In December, 1848, Ackerman went down with Blauvelt to take possession, and was at first opposed by Swift, who was there with some hands, stock, and utensils, cutting wood, making charcoal, and exercising ownership. He and Ackerman finally agreed upon a compromise settlement, by which Swift surrendered possession and what articles and property he had on the place, and received a note for \$550 together with a boat load of wood, as compensation for his expenditures and property, and Ackerman, as assignee, gave up the claim against him for the \$1750. The \$550 Ackerman afterwards paid.

After a few weeks, Ackerman and Blauvelt returned home, leaving the premises in charge of one Moses Springer, a friend of Blauvelt, who went down with them for that purpose. Springer staid three or four months, acting under the assignee, and when he left, one Daniel Robbins, neighboring land owner, took charge and kept it till the fall of 1849.

On the 16th of June, 1849, Ackerman, as assignee, sold the interest of Blauvelt in the Virginia property at public auction, at Archdeacon's hotel, in Paterson, New Jersey. Archdeacon bid it in by previous arrangement, for the sum of \$1650, and immediately sold his right to Ackerman for \$25.

In December, 1849, the commissioners who had sold to Banks delivered their deed for the premises to Ackerman. In the same month, Ackerman agreed with Philip Schuyler, of New York, to sell the Virginia property to Schuyler, together with the stock and utensils thereon, for the price of

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\$3200, which was to be paid by Schuyler and wife conveying to Ackerman certain real estate in Tenth avenue, New York, valued at \$4000, but encumbered with mortgages for about \$1700, which Ackerman was to discharge as part of the purchase money. Schuyler was to pay the difference between the \$3200 and the value of his Tenth avenue property, after allowing for the mortgage encumbrances. Schuyler did not get a deed for the Virginia property, but went immediately there, took possession, and held it till the summer or fall of 1853. He became unable to carry out his plans, and about that time returned to New York and gave up the Virginia property to Ackerman, without receiving anything for it from Ackerman, who continued the owner of the Tenth avenue property as before.

In October, 1855, Ackerman died. In May, 1866, his four sons and the devisees of his real estate sold the Virginia property to Albert J. Whittaker, of Trenton, New Jersey, for \$2100.

The Tenth avenue property consisted of two houses and lots, one of which was leasehold. The leasehold lot was sold by Ackerman in his lifetime, and \$532.85, part of the price, was recovered by him. The remainder of the price, \$302, was received by his sons and executors after his death. The other lot and house in Tenth avenue was sold by Ackerman's son, to whom it had been set off after his death, for \$4000. It was sold November, 1859. Ackerman in his lifetime had paid off the encumbrances on these houses and lots.

Ackerman made no settlement in court of his accounts as assignee, and left but scanty and imperfect records of his transactions.

On the 26th of January, 1858, Blauvelt filed his bill against Ackerman's four sons and their wives, against his daughter and widow, and an infant granddaughter, and against Whittaker, to whom the four sons and their wives had conveyed the Virginia property. The bill prayed an account against Ackerman's representatives, legatees, and devisees, and sought to set aside the sale to Whittaker.

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Answers and a replication being filed, voluminous testimony was taken and exhibits offered, when by a decretal order, filed July 28th, 1864, it was referred to A. S. Jackson, Esq., master, to take and state an account according to the directions of said order. Testimony was again taken to a considerable amount before the master, whose report thereon was filed June 16th, 1868.

The master reported that the sale on the 16th of June, 1849, at Paterson, to Archdeacon, and the sale thereafter to Ackerman, extinguished the trust, and that in his opinion, upon the evidence generally, the bill should be dismissed for want of equity.

Exceptions were filed by the complainant to this report, and the cause was argued before the Hon. Joseph F. Randolph, sitting for the Chancellor. Upon his opinion, reported in 5 *C. E. Green* 141, an order was made August 10th, 1869, that the master's report be set aside, and that it be referred to Bennington F. Randolph, Esq., master, to take and report the accounts directed by the decretal order of July 28th, 1864, and that the master be governed in so doing by the views expressed in the above mentioned opinion.


The report of the master, in pursuance of the last mentioned order of reference, was filed October 18th, 1871, and the amount therein reported to be due on the 1st day of August, 1871, is \$3637.59.

To this report the complainant excepted, claiming that the amount due is largely in excess of the amount allowed. By agreement of counsel the cause, as thus situated, is brought to final hearing.

Two questions are raised: *First*. Can the suit be maintained? *Second*. If it can be, what is the true amount due?

On behalf of the defendants, the main insistent has been that the bill should be dismissed, for the reasons that the trust created in Ackerman, as assignee, was extinguished by the Paterson sale; that the conduct of Blauvelt in connection with that sale, and his recognition of its validity in the following year, entitle it to have that effect; that his silence

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and delay in asserting his claim discredit its *bona fides*; that his business relations with Ackerman, after the Virginia property was sold to Schuyler, are inconsistent with the existence of a large debt from Ackerman, from whom Blauvelt, after the sale, borrowed money on the security of a chattel mortgage; that the small pecuniary means possessed by Blauvelt at the time of the assignment, as shown by the schedule taken in connection with the indebtedness which Ackerman, as assignee, afterwards settled or paid, render it highly improbable and incredible that any considerable balance could have remained unaccounted for, or could have existed; that the known value of the Virginia property, at the time of the assignment and afterwards, and its known productiveness, as shown by Blauvelt's experience before Ackerman took it and by the experience of Schuyler and Whittaker afterwards, are proofs that Ackerman never realized results approaching to those which, after his death and ten years after the assignment, Blauvelt claimed by his bill; that some settlement or understanding must have existed between them, which does not now appear, and which, if Ackerman were living, would appear and rebut the equities of the suit.

Granting, for the sake of directly meeting these suggestions, that the complainant's general right to maintain his suit was not settled by the decretal orders heretofore made, I am satisfied, upon looking into the evidence and carefully collecting the facts of the case, that the complainant is entitled to a decree, and that the question now presented for solution is a question of amount. It is impossible, I think, to consider the testimony of Blauvelt himself, and the general course of his conduct with Ackerman, without feeling the force of the above suggestions on behalf of the defendants, and I am disposed to believe that if Ackerman were living, or if Blauvelt's memory were more tenacious and correct than it evidently is, important facts would be disclosed to exhibit the general course of the assignee's transactions in a more favorable light for himself than that in which they

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now appear. But upon the whole case as it stands, a liability attaches to Ackerman's estate which, if somewhat indeterminate as to extent, must be attributed to his own loose and negligent manner of business. He assumed the trust at Blauvelt's request, but he was none the less bound to execute it with fidelity and account for the results with accuracy. He appears to have kept no account of his receipts, but only of his charges. These accounts are evidently imperfect, and cannot be relied on to exhibit the whole even of one side. The sale at Paterson must certainly be regarded as illegal, and in no wise affecting his liability as trustee. I concur entirely in the views expressed on this point and on others, in the opinion of Judge Randolph. Nothing definite and satisfactory anywhere appears, to show that the trust was at any time extinguished. This being so, it must be followed into all the changes of property, and the difficulties and obscurity now attaching to the settlement of details must not prevent the trust from being enforced. The best that the case admits of must be done, and the amount due ascertained with the closest practicable approximation to correctness.

The report of the master is a clear, careful, and systematic one. It covers the period from the summer of 1848 to the fall of 1859, when the last of the trust property was sold. The amount found to be due is, from the necessity of the case and the nature of the evidence, an approximation, and not an exact ascertainment. In stating the proceeds of the sales of real estate that came to Ackerman's hands, the rents received, charges paid, and encumbrances discharged, the details are undisputed and satisfactory. But in respect to what personal property, such as oxen, wood, charcoal, boats, store goods, vessel frames, &c., was on the place when Ackerman took possession in December, 1848, and how far the proceeds of these articles, or any of them, came to his hands during the year 1849, and before January, 1850, when Schuyler purchased and entered upon the premises, the character of the evidence is such that exactness, or anything like it, is unattainable. So also in regard to what Ackerman realized,

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or is fairly to be charged with for the proceeds of the place during the year 1849. Any result arrived at in respect to these matters must be little less than conjectural. Out of any given number of accountants undertaking to adjust a balance or settle the particulars on either side of this period of the assignee's transactions, I take it to be certain that no two of them would deduce from the materials as they are furnished in this case similar results ; and the differences between their results would probably be large. It is with respect to these matters that six out of the complainant's ten exceptions are taken. I have given much time and attention to an examination of these exceptions, and while I am unable to see with what precise view of the evidence the master arrived at the figures in his report in regard to the matters included in the first six of the exceptions, I am unable to see how any different figures can be inferred at all more consonant with the evidence as a whole, or more probably just with reference to the fixed and known data of the case.

Where a trustee has kept his accounts in a negligent way, or kept no account whatever of his receipts, all presumptions should be strongly against him, and obscurities and doubts should not operate to his advantage, but adversely. No doubt this is true, but I am unwilling, after looking through the whole of the evidence, and having regard to the large and evidently extravagant estimates of some of the complainant's witnesses, and the actual experiences before referred to of the owners or occupants of the Virginia property before and after the year 1849, when Ackerman held it, to say that the master could have arrived at any more equitable amount than that he has reached. The association between Ackerman and Blauvelt was such, and Blauvelt's connection with the transactions so free and unrestricted, and his acquiescence in Ackerman's management so general, that I find no sufficient ground for the belief that Ackerman intended to defraud. Blauvelt could not then have believed so himself. A severe rule, such as might in many cases be admissible and equitable where no regular and reliable account could be

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produced, if applied in this case so as to accept the highest guesses or estimates of witnesses after so many years, would lead to conclusions at variance with the reasonable probabilities of the case, and would show the year of Ackerman's occupancy to have been a year of productiveness many times greater than any since or before. Upon the best judgment I can form from the whole of the evidence, I am unwilling to say that the master's report in these respects is unwarranted by the proofs, and am therefore of opinion that the first six of the exceptions should be disallowed.

As to the remaining three of the exceptions, that is to say, the seventh, eighth, and ninth, my opinion is different. These relate to matters susceptible of more exact calculations and more definite judgment. The seventh and eighth relate to the allowance of interest. The master has allowed none on the rents arising from the trust property and collected by Ackerman or his estate, from the year 1850 to 1856 inclusive. For each of these years rents were regularly collected. They are charged by the master, and are accurately known. Interest is charged on them, or they are incorporated into the balance on which interest is computed from January 1st, 1857. I see no reason why, as the defendant or his estate received these amounts, interest should not begin to accrue from the dates of the yearly receipts. It would seem as matter of right to be due the complainant. I have computed it at six per cent. for each of the first six years, and find the total for the six years to be \$124.05. This sum should have been deducted from the \$311.54 balance against the complainant on the 1st of January, 1857. It would then have carried interest from that date to August 1st, 1871, the date of the master's report. This additional interest would, at the same rate, be \$108.50. To correct the report upon this exception, the sum of \$226.50 should be added to the amount due August 1st, 1871.

The eighth exception claims interest on \$2037 from May 20th, 1856, to January 1st, 1857. This sum was the net price for which the Virginia property was sold to Whittaker,

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and it was received by Ackerman's estate, May 20th, 1856. No interest is allowed by the master to January 1st, 1857. This omission, I think, should be corrected. The amount of the interest at six per cent., is \$75.33, which, if credited to complainant, in the balance of January 1st, 1857, would have increased the balance due, August 1st, 1871, by the sum of \$141.09. To correct the report upon this exception, the latter sum should be added at the last named date.

The ninth and last exception relates to commissions. The sum of \$173.50 is allowed by the master in favor of the defendants and is introduced in the account as of November 1st, 1859. I am of opinion that no commissions in this case ought to be allowed. The assignee's charges for his services and time are allowed as such by the master, and together with the questionable manner in which the trust has been generally performed, should exclude the further allowance of commissions under the statute on the amount of the receipts. The interest on this sum of \$173.50, from November 1st, 1859, to August 1st, 1871, at six per cent., is \$122.31, which, together with the principal, should be added to the balance due, as shown by the report, at the last named date.

The total sum to be added to the amount found to be due by the master, is consequently the sum of \$669.45. By adding this sum, the amount due from the estate of John Ackerman, Jr., deceased, to the complainant, on the 1st of August, 1871, will be \$4307.04, for which, with interest from the date of the report, the complainant is entitled to a decree.

This amount differs considerably from some of the several results I have been disposed to adopt in looking at the case from different standpoints, and with reference to different aspects of the evidence. But upon the whole, my conclusion now reached is more satisfactory than any other I have considered, and I think, more nearly adjusted to all the known and all the probable equities in the case. The extravagant claims set up in the bill and attempted to be sustained by the complainant himself, have not impressed me with the convic-

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tion that his recollections and statements, or those of the witnesses he has produced, can be accepted with confidence against Ackerman, who is dead. Nor, on the other hand, can I see reason to justify the conclusion that the accounts were settled in Ackerman's life. I think they were not. The parties, by their own acts and management, have covered the case with obscurity and difficulties, and if exact justice cannot now be done, it is due to themselves that it is so.



PREROGATIVE COURT.

FEBRUARY TERM, 1872.

In the matter of the Probate of the last will of WILLIAM
G. ALPAUGH, deceased.

Where it does not appear whether the testator did or did not sign the will or acknowledge the signature to be his in the presence of the witnesses, but the testator, after his name was signed to the will, declared it to be his will and asked them to sign it as witnesses, and the attestation clause is in the handwriting of the testator and declares that it was signed in the presence of witnesses, the certificate must be taken as true, and as proof of signing in their presence.

On appeal from decree of the Orphans Court of Hunterdon county.

Mr. Bird and *Mr. G. A. Allen*, for appellant.

Mr. Van Fleet, for respondents.

THE ORDINARY.

The objection to the will in this case being admitted to probate is, that it does not appear by proof that the testator signed it in the presence of the witnesses, or that he acknowledged the signature to be his in their presence. This is required by the statute, *Nix. Dig.* 1032, § 24, and no other evidence can be allowed to supply the defect. If twenty witnesses saw him sign or heard him acknowledge the signature, it will not supply the requirement of signing or acknowledgment, in the presence of the persons whom he selected as the legal witnesses of this solemn act. In this case the testator drew the whole will, including the attestation clause, which declares that it was *signed* in the presence of the

In the matter of the will of William G. Alpaugh.

witnesses. The witnesses testify that after Mr. Alpaugh's name was signed to the will he took it in his hand, declared it to be his last will, and asked them to sign it as witnesses. Neither of them testifies that he saw Alpaugh sign it, or that he acknowledged the signature to be his. Neither of them says that Alpaugh did not sign it in their presence. They were not asked directly whether they saw him sign. Each states such facts as he remembers, and says further that he does not recollect all that was done or said.

In such case, as in the case of the death of the witnesses, the attestation clause must be taken as true, and as proof of signing in their presence. Most especially in this case, where the attestation clause is in the handwriting of the testator, and shows that he knew the requirements of the law, the presumption will be that he saw to it that they were complied with. If the attesting witnesses had testified that they did not recollect whether the will was signed in their presence, the effect would be the same. If they had testified positively that the will was not signed in their presence, but was signed before they came, their evidence would not be overcome by the certificate in the attestation clause, but might be by convincing proof that it was actually signed in their presence.

In this case the want of recollection, or the want of proof, is remedied by the presumption arising from the attestation clause, and is sufficient to warrant the determination of the Orphans Court in admitting the will to probate, as signed by the testator in the presence of the attesting witnesses.

The decree must be affirmed.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1872.

LOZEAR, appellant, and SHIELDS, respondent.

1. In cases of alleged want of mental capacity, the test is whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated.

2. On a bill to redeem, the general rule is that the mortgagor must bear the costs; but the mortgagee, by his misconduct, may forfeit his immunity, and be condemned to pay them.

Whether an appeal will lie from a decree on the point of costs.—*Quære.*

This was a bill to redeem. The property mortgaged had been owned by the mortgagee, and had been conveyed by him to the mortgagor, and the mortgage in question had been given by the latter to secure a part of the purchase money. Some time after the mortgage had fallen due, the mortgagor tendered the amount of the principal and interest to the mortgagee, who refused to receive it. The bill to redeem grew out of this refusal.

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The mortgagee filed an answer, and exhibited a cross-bill, setting up that at the time of the conveyance of the premises, he was so far deprived of his reason that he was disabled from acting rationally and making sale of his land.

The case came on for final hearing in the Court of Chancery on the bill, answer, cross-bill, and proofs.

The appeal is from a decree of the Court of Chancery, made in accordance with the opinion of the Vice-Chancellor, reported in 7 *C. E. Green* 448.

Mr. Shipman, for appellant.

Mr. Vanatta, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The Vice-Chancellor, who heard this case, decided against the defendant below, who is the appellant in this court.

The defence stood upon the ground that the transaction, embracing the sale of the property and the taking of the mortgage, was invalid, in consequence of the want of mental capacity in the appellant. Upon the opening of the matter here, this court considered the questions involved so clear of doubt that the counsel of the respondent was not called upon for a reply.

On the point of intellectual incompetency, which was the only one involving the merits, the proofs were conspicuously feeble. Taken at the strongest, they merely showed an excitement of mind, touching religion, which tended towards monomania. Even if aberration of mind existed, it was confined to this sphere of mental action. There was no attempt to show anything beyond this. The defence, therefore, was built upon a false foundation, viz. on the supposition that if any phase of insanity was apparent, the transaction in question was invalidated. But this was an entire mistake. Such a circumstance would indeed quicken the ordinary vigilance of a court of justice into a watchful jealousy, but standing alone, it would not be sufficient, of necessity, to set aside a

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sale of real property, or any other act. Mania does not, *per se*, vitiate any transaction, for the question is whether such transaction has been affected by it. Where a pure defence of mental incapacity is interposed, I think the true test, in this class of cases is, whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. This is the rule in the absence of fraud, for fraud, when present, introduces other principles of decision. In the present instance there is no pretence of any imposition. It is abundantly shown that the price paid for the property was a fair one, and it is equally clear that the appellant perfectly understood the character, legal conditions, and effect of the act of which he now complains. Under these circumstances, the proof of a morbid turn of mind, on a subject entirely disconnected with the sale of his property, was absolutely irrelevant. The conclusion of the Vice-Chancellor was the necessary result from the facts in evidence.

The decision in the court below was also right with respect to the question of costs. The appellant complains that he has been burthened with the costs of the mortgagee on a bill to redeem. There can be no doubt that the usual practice in a court of equity is to refuse, in ordinary cases, costs to the complainant in suits of this description. The proceeding, in its simplest form, is one beneficial to the mortgagor alone, its object being to free the property from the encumbrance which he himself has put upon it; and hence the rule, as above stated, is a just one when applied to such a proceeding. But the mortgagee can lose the benefit of this rule by his own misconduct, and, under such circumstances, may be made to pay costs. There are a number of cases in the English reports which establish this reasonable exception to the general rule. Among these are the following, viz. *Shuttleworth v. Lowther*, cited in *Detillin v. Gale*, 7 Ves. 583; *Mocatta v. Murgatroyd*, 1 P. Wms. 393; *Harvey v. Tebbutt*, 1 J. & W. 197.

In the present instance, the conduct of the appellant has

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placed him, I think, within the scope of this exception to the general rule. His conduct has been vexatious and unjust. He put every obstacle in his power in the way of a tender of the mortgage money being made to him, and he refused the money when offered. He then set up an unfounded defence. This misbehavior made it equitable not only to refuse him his costs in the redemption suit, but to compel him to pay the expense of that proceeding. I think in this particular also the result in the Court of Chancery was correct.

To avoid misapprehension, it is proper to remark that in reviewing the foregoing question of costs it is not intended to intimate that it is unquestionable that an appeal will lie on account of an error in a decree on the point of costs. No opinion is expressed on the subject.

The question of a tender, unattended by the payment of the money into court, was not appealed from, and, consequently, has not been considered by this court.

The decree should be affirmed.

For affirmance—BEASLEY, C. J., CLEMENT, DALRIMPLE, DEPUE, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 10.

For reversal—NONE.

POTTS, appellant, and WHITEHEAD, respondent.

1. An acceptance, to be good, must be such as to conclude an agreement or contract between the parties; and to do this it must, in every respect, meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.

2. On a bill for specific performance, the alleged agreement consisted of an offer to sell land on certain specified terms, and the following letter: "Have twice attempted the tender of the first payment of \$500 upon the

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agreement made between us on the 7th December last. I will meet you &c., when I shall be ready to make tender of the money, and execute the proper agreements thereupon." *Held*, that this letter was not, either in terms or substantially, an acceptance of the offer, and concluded no contract between the parties.

The opinion of the Chancellor is reported in 5 *C. E. Green* 55.

Mr. J. C. Potts, for appellant.

Mr. Ludlow, for respondent.

The opinion of the court was delivered by
WOODHULL, J.

The appellant seeks to enforce the specific performance of an alleged agreement in writing for the sale of land. To show the agreement, two separate writings are relied on: the first, an offer to sell, dated December 7th, 1865, to be accepted within thirty days from the date, signed by the respondent; and the other, a letter dated January 3d, 1866, written by the appellant, accepting, as he alleges, the offer of December 7th.

The principal questions discussed before us were: 1. Whether the letter of January 3d amounted to a legal acceptance of the respondent's offer; 2. Whether it was properly communicated to the respondent; and 3. Whether, admitting its sufficiency as an acceptance, and that it was properly sent, so as to bind the respondent, the contract resulting from it is not too uncertain and incomplete in its terms to be enforced by a court of equity.

As a mere proposal or offer to sell cannot become an agreement without being accepted, and as it is not claimed that the offer in this case was accepted otherwise than by the letter of January 3d, it follows that if that letter did not amount to an acceptance there was no agreement at all between these parties, and, of course, nothing on which the appellant's case can stand.

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As to what are, in general, the characteristics of a good acceptance, there seems to be very little difference of opinion.

An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. *Huddleston v. Briscoe*, 11 Ves. 583; *Curr v. Dural*, 14 Pet. 77; *McKibbin v. Brown*, 1 McCarter 13; S. C., Court of Appeals, 2 McCarter 498; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Routledge v. Grant*, 4 Bing. 653; *Kennedy v. Lee*, 3 Meriv. 441; *Hutchinson v. Bowker*, 5 M. & W. 535; *Eliason v. Henshaw*, 4 Wheat. 225; 1 *Parsons on Con.* 476, 477; *Story on Sales*, (3d ed.) 142, § 136, and cases cited n. 1.

If the letter of January 3d had contained simply the words, "I accept your offer;" or, "I accept the terms proposed by you;" or any other words of like import, referring distinctly to the writing of December 7th, and had stopped there, it would, without doubt, have been a good acceptance.

It is insisted on the part of the appellant, that in substance and legal effect, the letter as it is does not differ from what it would have been in the case supposed. But we cannot so regard it. The letter does not, either in terms or substantially, accept the respondent's offer. While we may fairly infer from its language that the appellant intended and expected to conclude an agreement embracing the terms proposed, we are compelled to infer also, that this was not to be done without the addition of another term not yet provided for. The time to be allowed for the payment of the large residue of the purchase money, \$23,500, was manifestly understood by the appellant to be the subject of further negotiation and a future agreement.

Such being, in our judgment, the true import of this letter, we think that the Chancellor was clearly right in holding that it did not amount to an acceptance of the re-

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spondent's offer, and concluded no contract between these parties.

Upon the second and third questions we express no opinion.

We are satisfied, from the evidence, that the charges made by the respondent in his answer and in his testimony, of fraud or unfair dealing by the appellant in any part of this transaction, are wholly without foundation. And equally groundless, we think, is the suggestion made by the appellant's counsel, that the time when the balance of the purchase money should be paid had been actually agreed upon before the writing of December 7th, and had been left out of that writing by mistake.

Neither the bill, nor any part of the appellant's testimony, give the least countenance to this suggestion. We are quite satisfied too, that the writing of December 7th was fairly and honestly written by the appellant, and correctly read by him to the respondent. The statements of the respondent which seem inconsistent with this conclusion we take to be the result of misconception, arising, probably, from an inadvertent blending together in his memory of two separate negotiations relating to the same matter.

Decree of the Chancellor in all things affirmed.

The whole court concurred.

JUNE TERM, 1872.

THE NEWARK AND NEW YORK RAILROAD COMPANY, appellants, and THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, respondents.

1. An order of the Chancellor, made at the final hearing, for an issue to be tried by a jury, is appealable.
2. On an appeal from such an order, the court, in its discretion, will decide the entire controversy or send the case back with instructions.

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3. If the issue is a simple one and the evidence is defective, the case should not be referred to a jury, but the taking of further evidence ordered.

Mr. Williamson, for appellants.

Mr. W. H. Francis and *Mr. McCarter*, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

In these proceedings the Chancellor, on the final hearing of the cause before him, ordered as follows, viz., "that the parties do proceed to a trial at law at the next Circuit Court, to be holden at Newark, in and for the county of Essex, upon the following issue: whether or not the defendants, by their charter and irrespective of any act or acquiescence of the complainants, had, or had not, lawful authority to locate and construct their railroad as they have done, in Hamilton street, in the city of Newark, and to run engines and cars thereon."

The issue thus directed embraces, in substance, the gravamen of this controversy, and the question which the appellants have sought to present for the decision of the court is as to the propriety of this order. On the other hand, as a preliminary consideration, the respondents insist that this inquiry cannot be entertained, because, as it is urged by them, an appeal will not lie from an order of the Court of Chancery for an issue to be tried by a jury. This being a jurisdictional objection, calls for primary attention.

This question is one of first impression in this court. I do not find that there ever has been an appeal taken in this state from a decree of this character. But this equitable prerogative of ordering an issue which is undoubtedly legitimate, has, with great propriety, been so sparingly exercised, that it is not at all remarkable that instances of attempts to bring its exercise under appellate supervision are not to be found in our reports. The only judicial reference to this topic, which I have discovered, is in *Bluck v. Lamb*, 1 *Beas.*

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113. In the opinion read in that case in the Court of Chancery, it is stated that an appeal will not lie from an order of the court directing an issue, or for refusing one, upon the application of either party, but this was obviously a mere cursory remark, made without any examination of the precedents. The occasion did not present the point distinctly to the mind of the Chancellor, the subject under consideration being the propriety of the order for an issue in that particular case, and the power of the Chancellor over the verdict rendered on the issue; and it was the views expressed on this subject which were approved of by the Chief Justice in his opinion in this same case in this court. 2 *Beas.* 455. I do not understand that there is any intimation in this latter opinion with respect to the order for an issue being appealable or otherwise. There was nothing in the inquiry calling for any consideration of that subject, and any expression of views would have been a mere dictum. Under these circumstances, I consider this question now for the first time to be placed, in this state, before a court in the regular course of decision.

In the absence of modifications arising from statute, or an established course of proceeding, the practice of this court is in conformity with that of the House of Lords. On all unsettled points this is the model to which we recur. With the exceptions just mentioned the established English routine is the law of this court; and such law is as obligatory, until altered by statute, as are any of the general principles of the common law. I think it undeniable, that with the above reservation, every decree or order which could have been appealed to Parliament at the time of the American Revolution, can be appealed to this court. There is nothing in our statute which appears to circumscribe this jurisdiction. Its words are, "all persons aggrieved by any order or decree of the Court of Chancery, may appeal from the same or any part thereof, to the court of Errors and Appeals." I regard this simply as declaratory of the ancient English rule, but it is obvious that the description of the subject embraced is so wide as to require the force of construction to compress it

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within such limit. Nor has there been in the decisions of this court any tendency displayed to contract, by virtue of this statutory definition, the boundaries of our jurisdiction. This subject, in relation to this act, was carefully considered by this court, in the case of *The Camden and Amboy Railroad Company v. Stewart*, 6 C. E. Green 484, and it was there said that it was the legislative intention "to give a wide scope to appeals," and that this appellate jurisdiction over that class of cases to which no established test could be applied, was to be adjudged by the peculiar circumstances of each of such cases. This certainly was no curtailment of the power of this court, so that I think it can be safely said, that this court has never indicated any intention to abandon any part of the authority inherent in its original constitution.

On the foregoing premises the question now presented is not, that I can see, open to the least controversy. The precedents show that, according to the old and clearly established practice in the English courts, an order of the Chancellor, either granting or refusing an issue for a jury, was a subject of appeal. The course of this practice has been uniform, and its propriety has never been, so far as I can learn, judicially criticised or questioned. It is laid down in the text books as an ordinary proceeding. The doctrine is thus explicitly stated by Mr. Daniell, (2 Ch. Pr. 1075, 4th Am. ed.) "Except in cases of an heir-at-law, or of a rector or vicar, who were entitled to issues as a matter of right, the granting of an issue by a court of equity was entirely a matter of discretion in the court, which it would not, however, exercise without due deliberation, and a mistake in the exercise of which was a just ground of appeal; and, therefore, if the court refused an issue, and the Court of Appeals thought that the contrary decision would have been a sounder exercise of discretion, it would rectify the order of the court below accordingly; and so when the House of Lords thought that the court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause with directions to the judge to decide upon the matter him-

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self." The cases cited amply authorize this emphatic statement, and these cases are both of ancient and modern date. The line of these precedents is so extended and unbroken that it would be a waste of time to explain or even cite them in detail. I cannot think that any one can refer to these authorities and be left in any doubt upon the subject. The Court of Errors in New York, as originally constituted, and during the period when Chancellor Kent was a member, sustained an appeal from an interlocutory order of the Chancellor for an issue to be tried at law, referring, for authority for such a proceeding, to the practice of the House of Lords. *Le Guen v. Gouverneur & Kemble*, 1 *Johns. Cas.* 436. At a period twenty years subsequent, the same Chancellor referred to this decision with evident approval. *Dale v. Roosevelt*, 6 *Johns. Ch.* 257. *Bush v. Livingston & Townsend*, 2 *Caines Cas. in Err.* 66, stands in the same train of cases. That a different rule, since the uncertainty introduced by the Code of Procedure, has been adopted in New York, as appears from the case of *Candee v. Lord*, 2 *Const.* 269, seems to me aside from the purpose. That decision does not purport to rest on any ancient practice, nor are the cases just cited even referred to. As it is clear that an appeal will lie to Parliament from an order for a trial by jury, it necessarily follows, as I think, that an appeal will lie from an order of the same kind to this court. The jurisdictional objection to this appeal is not well taken.

The next question to be decided grows out of the contention of the counsel of the appellants, that this court, on this appeal, will not only look into the question as to the propriety of the order for an issue, but will also look at the whole case, and, in the event of finding the ground for a final decision, will proceed to dispose of the entire controversy. The position taken is this, that the bill of the complainants, who are the respondents here, contains no equity, or that, if it does, such equity has been lost by their laches.

The Chancellor, as appears from the recital in the order for the issue, decided that the claim in the bill was equitable,

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and that it had not been lost. These were preliminary matters, for it is obvious that unless the complainants had this standing in court, the order for a trial would have been frivolous. It is, therefore, now asked, if this court shall be of opinion that, on the facts of the whole case, it is demonstrably clear that the complainants have no equity which can be enforced, why final judgment should not be pronounced. The counsel for the respondents deny the power of the court to render such final decree on this appeal.

But this latter view cannot be sustained. Again, a jurisdictional question is raised and is to be settled by the precedents, and such precedents are all in favor of the power to render a final decree. The general rule is that the appellate tribunal will render such judgment as the inferior court, under all the circumstances, should have given, and this rule has always obtained, in full force, in cases of appeal from decrees for issues of fact. *White et al. v. Lightburne*, 2 *Brown. P. C.* 405, affords an illustration of this practice. The gravamen of this case was the bona fides of an article of agreement, which was averred to have been obtained by fraud and without fair consideration. The Chancellor, at the final hearing, ordered a feigned issue. On an appeal to Parliament this order was set aside, and a final decree substituted annulling the article of agreement as fraudulent. The date of this precedent is 1722.

Three years later occurred the case of *Rous v. Barker*, 3 *Brown. P. C.* 180. The dispute grew out of the uncertainty as to the location of certain copyhold lands, and the lord of the manor filed his bill to have a commission appointed to make the requisite ascertainment. The court refused this prayer, and referred the question to a jury. This was at final hearing; and, on appeal, this decree was reversed, and a commission was ordered. The principle in both of these cases is the same, and it should be remarked that in the first one the point was distinctly taken by the counsel of the respondents, that an order for an issue "was but the ordinary justice of a court of equity, and that there was not the least

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color for appealing from such a decree." In both these instances the appellate court acted on the general principle above stated, and rendered the judgment which the subordinate court should have rendered.

This question was largely discussed and considered, and was finally decided, in the case already cited on the first point, of *Le Guen v. Gouverneur & Kenble*, 1 *Johns. Cas. in Err.* This case was one which presented, with much prominence, the propriety of the existence of this power in the appellate tribunal. The bill was to set aside a judgment on the ground of fraud, and the Chancellor directed an issue of fact. The court, on appeal, came to the conclusion that such fraud, even if shown, would constitute no defence to the judgment. The position, therefore, was, that on the admitted facts the complainant had no equity, and, under such conviction in the superior court, it appeared to be an idle form to remit the case for the inconclusive judgment of the subordinate court. The result was the conclusion that the power existed for the appellate court to proceed to final judgment. This course was taken after a full examination of the English authorities.

It need hardly be observed that the superior court is under no constraint to conclude the case by its own action. Whenever such course, under any given state of facts, seems preferable, a decree will be made sending the matter for final decision to the court below. There are a number of recent instances of such a course of proceeding. *Nicol v. Vaughan*, 2 *Dow & Clark* 420; *S. C.*, 5 *Bligh's Appeals* 505; *Earl of Winchilsea v. Garretty*, 1 *M. & K.* 253.

In view of these authorities, I can entertain no uncertain opinion with regard to the power of this court to deal with the present case on its merits. How far it is proper, as the proofs stand, for the court so to do, is the only question for consideration.

It seems to me that this court should pass upon the question as to the equity of the bill, and the alleged loss of that equity, if such existed, by the respondents; for if we concur,

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in either of these heads, with the views of the appellants, it would be quite idle to remit the case to the Chancellor, who has already come to a contrary result. Under such circumstances, we would send the case down for a formal decision, which we would reverse as soon as the proceedings, in due routine, should be returned to this court. It is obvious that the Chancellor could not have made an order for an issue without deciding both these points in favor of the respondent: it is equally obvious that this court cannot pass upon the propriety of the same order without, antecedently, deciding the same points. In my judgment, the questions, therefore, are to be answered by this court. Does the bill in this case disclose any equity? and if so, has such equity been forfeited by the acquiescence of the respondent?

The Chancellor responded to the former of these questions in the affirmative and to the latter in the negative, and in both these responses I entirely concur.

As I consider these matters quite plain, I shall dispose of them in a few words.

The solid standing of the complainants in the Court of Chancery consists, I think, in this: they show that they represent the municipality, having the care and charge of the public streets of the city, and they allege that the defendants tore up the pavements, and laid down and constructed "through the entire length of the said section of Hamilton street, lying between Mulberry street and Lawrence street, and diagonally over the same from northeast to southwest, a portion of their railroad, being a double track railway, occupying a strip of almost fifteen feet in width, and with the overhangings of their cars used by them on said tracks occupying a strip of about twenty-one feet; and subsequently, they allege "that there was no necessity for the construction of their road in the manner aforesaid, in crossing Hamilton street, nor was it reasonably necessary that the defendants should lay their double track railway so as to infringe upon Hamilton street at so acute an angle." In these averments I find a substantial equity. The defendants have

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clearly no right to occupy for their road any portion of the public streets of the city of Newark, except to the extent of a reasonable necessity. Upon the argument before this court it was not urged in their behalf that their franchise had a wider scope than this. The consequence is that this charge that they have subjected to their use a larger portion of the public street than is reasonable, exhibits a *prima facie* case for the action of a court of equity. Almost the entire residue of this bill, with the exception of its formal parts, appears to me to be superfluous. But the averment of the unnecessary occupation of this public street gives the respondents a sufficient standing in court.

With regard to the second objection, I do not think the proofs present a conjuncture to which the doctrine of acquiescence should be applied. Indeed I am not prepared to say that the principle should ever be interposed to bar the rights of a public corporation. I am not aware that this particular has received the attention of the courts, but many reasons suggest themselves why the doctrine should not be deemed applicable to that class of cases. As a general rule, the public at large does not lose its rights by the inattention of its agents, and hence the maxim, *nullum tempus occurrit regi*. There seems to be no reason why this same principle should not be held to protect the inhabitants of a city. The officers of a city cannot, by express sanction, legalize the placing of a nuisance in a public street, and it does not seem possible to give a greater effect to their negligent inaction. At all events the doctrine of the forfeiture of equitable rights by the laches of municipal officials should be restricted to the narrowest bounds, and should be applied only in cases of the grossest neglect and which have materially affected the conduct of the party complained against. To some extent this limitation of the rule has been declared to exist even in the case of a private corporation, for in the case of the *Carriers' Company*, 2. Dr. & Sm. 355, it was said that although a corporation may be bound by acquiescence, as well as an individual, yet the rules respecting acquiescence which apply to

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an individual, do not apply with the same strictness to a corporate body.

The facts before the court will not place the present case within the control of this restricted principle. It is true that ordinances were passed to accommodate the grade of these streets to that of the railroad, but as the railroad track had necessarily to cross these streets, such regulations were proper, at whatever angle over Hamilton street the track was to be laid. It does not appear that the attention of the officers of the city was distinctly or specially directed to the extent to which the appellants designed to occupy this street, and in the absence of explicit proof to this effect, I think there is no ground to charge the corporate body with acquiescence in the act. These proofs may have been sufficient to disentitle the respondents to an interlocutory injunction, but it is entirely too slender to deprive them of their equitable rights on the final hearing. This ground of defence was rightly overruled. The question which remains relates to the order of the Chancellor directing an issue to be tried by a jury.

I think this court should not interfere with such orders without great caution. In cases of complex and intricate facts, involving a detail of circumstances and requiring the testimony of numerous witnesses, the mode of trial directed in this decree is often convenient and sometimes almost indispensable. The purpose of the proceeding is to assist the Chancellor in the formation of an opinion. On all occasions of doubt and real difficulty, the Chancellor has the right to the advice of a verdict, and this privilege, at such times, could not be properly refused. But it is also apparent that the parties to a suit in Chancery should not be put to the delay and expense of a trial at law, unless the result of such trial is likely to have a weighty influence in the decision of the controversy. And it is this consideration which appears to me to raise up an insuperable objection to the present order. After a careful consideration, I have entirely failed to perceive how the opinion of a jury on the present issue

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could help or sensibly affect the judgment of the Court of Chancery. The only issue to be decided is, whether the road of the appellants cuts Hamilton street at too acute an angle. There is nothing else in dispute. The pleadings do not raise any other issue. It is not denied that the appellants' road, with respect to its general course, has been properly located, or that it can legitimately be laid across Hamilton street. On the part of the city, it is said that, by making a slight curve, this track can be carried over this street so as to occupy not more than seventy feet of it; on the part of the company, the contention is that this is not practicable, and that it is necessary to appropriate for this use over four hundred feet of this street. This is the knot to be untied. Can it be said that a jury is requisite to assist in the labor? The problem is certainly a simple one, and I have been unable to persuade myself that a trial at law is necessary for its solution.

But while I am compelled to deny the necessity for an issue, I can readily understand why the Chancellor should have hesitated to decide this point on the evidence as it now stands. There are only two affidavits which relate to this issue, the one being that of the city surveyor, and the other that of the surveyor of the railroad company. The one avers that the track can be laid so as to cross the street without occupying a third of the present space; the other controverts this allegation. Neither witness was cross-examined, so that we have but little more than an affirmation on the one side and a denial on the other. The question belongs to the science of engineering, and the examination of a few experts will put the matter at rest. But a defect of evidence of this character does not give rise to any necessity for a trial at law. The omission of the necessary proofs can be supplied by the order of the court. This is, and always has been, one of the powers of a court of equity. The practice is so ancient that it is referred to in two of the notes of *Cay's Reports*, pp. 37 and 83. "An equity judge," says Mr. Gresley, (*Er.* 489,) "has this most material advantage over the com-

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mon law tribunal, that he is not bound to pronounce his decision at once, immediately after the trial. He may not only postpone his judgment, but if he finds the evidence unsatisfactory or defective, and is unable to elucidate the subject from his own resources, he may call for further information."

I think the order for a trial at law should be vacated, and an order made that further testimony be taken on the single question, whether, with a reasonable regard for the rights of the city of Newark, and of those of the appellants, the railroad track has been properly laid in Hamilton street, and if not, what alteration should be made at that point.

For vacating the order—BEASLEY, C. J., DALRIMPLE, DEPUE, LATHROP, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 10.

Contra—NONE.

PERKINS and others, appellants, and ELLIOTT and wife, respondents.

1. A married woman cannot charge her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or her estate.

2. The rule is the same, whether such separate estate has been created by deed or will, or by force of the statute relating to the property of married women.

3. A married woman executed a joint and several note with her husband, stating therein that the money was to be a charge on her separate estate, and it appeared that this money was to be applied to the payment of a mortgage given by the husband and the wife on the lands of the husband. *Held*, that the feme was bound, as she derived a benefit from the transaction, in relieving the lands in which she had a dower right from the encumbrance.

The opinion of the Chancellor is reported in 7 C. E. Green 127.

Mr. Pitney, for appellants.

Mr. Vanatta, for respondents.

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The opinion of the court was delivered by

THE CHIEF JUSTICE.

The bill in this case alleges that the female defendant, Louisa Elliott, is seized and possessed of certain real and personal estate for her separate use, by force of the statute of this state for the better securing the property of married women, and that having such property she, in conjunction with her husband, made a joint and several promissory note, containing an express provision that it should be a charge upon the separate estate of the feme. The purpose of this action is to enforce this provision, and charge the money due upon this note upon the separate estate of the wife. This the Chancellor refused to do, holding that a married woman invested with the property and interest created by the act just referred to, could not, by her simple contract in writing, bind herself as surety for another so that a court of equity would enforce such obligation against her, even though the intention to bind her separate estate was clear, and was expressed in the instrument executed by her. The precise point of this decision is new to the jurisprudence of this state, and is a question of considerable moment. My researches into the subject have been attended with more than ordinary interest, and I have examined the numerous decisions with attention and care, and my conclusion is, contrary to my preconceived opinion, that the state of the law is such that this court is at liberty to deal with the question at issue as one which is entirely undecided in our courts, and concerning which no peremptory authority exists. My examination has satisfied me that this entire subject, with respect to the power of the feme covert over her separate estate, has been the creation of the court of equity, and that the system has been, from time to time, circumscribed or extended, not under the coercion of any inflexible rules or established principles, but in accordance with judicial opinion founded on very general considerations as to the propriety or policy of the particular circumscription or expansion. No one who has the least acquaintance with the topic can doubt that the

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rule that a feme can bind her separate estate by a contract of suretyship, and this too in the absence of any expressed intent so to do, is, and has been for a long time past, entirely settled in the English courts. But still the doctrine, in its established form, is not sufficiently ancient to have in this court an imperative force, and the consequence is, as I have already remarked, the way is open for us to adopt a rule which will embrace, or one which will exclude, the power which has been exercised in the present instance. Any extended review or criticism of the line of cases which belong to this branch of the law would, as it seems to me, answer no rational purpose on this occasion. A very full collection of them is to be found in 1 *White & Tudor's Leading Cases in Equity*, p. 394. The only reference that I shall make to these decisions will be such brief notice as is necessary to justify the conclusion just expressed, that the rules which in the English courts regulate the subject, owe their origin not to the ancient institutes of the law, but to the judgment of successive Chancellors, influenced by reasons which do not imperatively demand implicit assent.

Looking back to the beginning of this system, we find that the separate estate itself of the feme covert is a pure creature of equity. It bears no analogy to anything existing in the common law. According to the general legal doctrine, the effect of marriage was to merge the existence of the wife into the legal life of the husband, so that with respect to property and civil rights, she, as a separate person, had no recognition. In open derogation of this cardinal principle, equity chose to invest her with a capacity to hold property in her individual right. It is certainly not to be wondered at that an estate thus originating in this clear violation of the laws of property as between husband and wife, should have been afterwards modified to suit the supposed convenience or exigency of the case.

Nor did equity scruple to introduce another anomaly when the occasion seemed to require it. It having been settled that the wife might enjoy a separate estate, the result was, as

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the laws of property attached to it, that she could alienate it, and this power in its application to settlements, proving disadvantageous, the defect was remedied by another violation of legal rules, and a restraint against alienation inconsistent with the nature of the estate granted, was supported. The structure raised on a foundation thus arbitrarily laid, could of necessity have no other form than that which would proceed from the will of the builders. And such in truth was the result.

The married woman being thus recognized as the owner of the estate, the question arose as to the nature and extent of her authority over it. It became obvious at once, that in order to enjoy the privilege thus granted she must be allowed to make contracts with respect to her separate interests, and it was accordingly soon intimated in *Grigby v. Cox*, 1 Ves., sen., 517, and in *Peacock v. Monk*, 2 Ves., sen., 190, that to this extent she would be regarded in equity as a feme sole. The result was that those contracts which a woman under coverture made touching her separate property, although void at law, were universally enforced in equity, the principle at first being that such contracts, operating on the property, were in the nature of the execution of a power of appointment. But it was soon supposed that this principle was not broad enough to satisfy the purposes to be subserved, and accordingly in the great case of *Hulme v. Tenant*, 1 Bro. C. C. 46, Lord Thurlow decided that a bond of a feme covert, jointly with her husband, would bind her separate property. His language is: "I have no doubt about this principle, that if a court of equity says a feme covert may have a separate estate, the court will bind her to the whole extent as to making that estate liable to her own engagements, as, for instance, for the payment of debts, &c." This case does not appear to have been entirely satisfactory to Lord Eldon, but he never judicially departed from it, and it has been followed in many subsequent cases, and according to Lord Cottenham, it contains the correct view of the principle upon which

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equity acts in giving effect to the agreements of married women. *Owens v. Dickenson*, 1 Cr. & Ph. 54.

This principle, that the general engagements of a feme covert will be effectuated by the method of the court acting on her separate property, has in a long series of cases been applied and put in force. Thus it has been held that she can render her estate liable in the form of an acceptance of a promissory note, or her own note, or on an engagement to pay an additional rent for a house, or on her promise to pay the costs and proceedings of a suit in chancery.

I think it thus appears that this equitable plan of proceeding with regard to the powers of a married woman over her separate estate, has sprung up by degrees, and has been gradually unfolded, and an examination of the cases will show that each successive development has been marked by doubts and contestation. During the period of its progress, eminent jurists have entertained and expressed from the bench contradictory opinions, not only with respect to the grounds of decision, but concerning the judgment to be pronounced on important branches of the system.

And although the theory of the English courts on this subject has, after an agitation of a century, settled into form and coherence, the process by which this result has been produced has not escaped the criticism of some of the most distinguished of American lawyers. Chancellor Kent, in the case of the *Methodist Church v. Jaques*, 3 Johns. Ch. 77, uses this language: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a feme covert could for a moment be deemed valid. She is incapable of contracting according to the 'common right' mentioned by Lord Macclesfield; and if investing her with separate property gives her the capacity of a feme sole, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a feme sole in any other view, or for any other purpose." A similar stricture is pronounced by Judge Story in his work on Equity Jurisprudence. Nor have the English principles on

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this subject been received, in their integrity, by many of the courts in this country, and perhaps it is not too much to say that the law regulating the dominion of femes covert over their own property, as it at present exists, is not identical in any two of the United States.

The decisions of our own courts, so far as they extend, are for the most part in harmony with the English precedents; but in the initial case in this state, the subject was characterized as "one of the most vexed and embarrassing questions raised in the Court of Chancery." The judicial course in this state on this subject is so well known that it is quite unnecessary to attempt to trace it here; it is enough to remark that, in *Leaycroft v. Hedden*, 3 *Green's Ch.* 547, the Chancellor, in adopting the rule that a feme covert is a feme sole as to her separate estate, so far as to dispose of it in any way not inconsistent with the terms of the instrument under which she holds, expressly states that he takes this course, not on the ground of any clear precedent, but because such course appears to him to be equitable, the conflict of opinion in the decisions being such as to leave him to the exercise of his own judgment.

I have thus briefly treated the commencement and gradual development of this doctrine, and have endeavored to show that it has been created and fashioned into its present form by courts of equity; that the work, at every step, has been attended with difficulty; that each new application of its cardinal principles presented a vexed question; that judicial opinions, in many important particulars, have been vague and often times discordant, and that the English system, thus formed, has not been received, without many qualifications, by the courts of this country. In this review, the object has been to justify the position taken at the commencement of this opinion, that on this occasion we are not bound by precedents, but are altogether free to adopt such a rule as we may deem, on principles of equity, the true one to the facts of the case.

The proposition is this: Shall a court of equity enforce

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against the separate property of a married woman a contract of suretyship made by her, from moral considerations? It seems to me, that for this court to execute such an agreement would be to apply the principle that a feme covert is to be regarded in equity as discover with respect to her separate estate, and with respect to contracts relating to it, with an unwise latitude. The concession to a feme of a capacity to hold a separate estate, in an absolute form, necessarily carries with it all the powers which are requisite to the enjoyment and disposition of such property. As owner, she can sell it, or encumber it, or transfer it even as a gift. Considering her as the separate proprietor, these capacities are comprehended among the qualities of the estate, with the title to which she is invested. So it may also be forcibly insisted that the general engagements will be charged by equity against her property, the argument being that when she contracts a debt she makes use of her separate property, and, as it were, converts it by anticipation, *pro tanto*, into money. A feme covert, who borrows money, necessarily does so as the owner of a separate estate, for she can bind herself in no other capacity; the inference, therefore, from such act, certainly is not forced or far-fetched, that her intention was to charge her property. I can, therefore, readily comprehend how the English doctrine has grown up, that all the debts incurred by a married woman for her own benefit, or for the benefit of her estate, should be imposed on her individual property, on the ground of a manifest design to create such an encumbrance, and because it is one of the modes of enjoying property, to incur debts on the credit of it. But, when we proceed a step farther, and come to an agreement to stand as the surety of another, I confess I lose sight of the principle on which the general system should rest. Such obligations have nothing to do with the separate estate of the feme. The right to create them is a personal right, unconnected with the ownership of goods or lands, and not embraced in the fullest exercise of the *jus disponendi*. Such obligations are not, in any sense, necessary, or even convenient, to the enjoyment of

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her property by the married woman. The true doctrine seems to me this: That to the extent that the feme does any act which enables her to use or enjoy her separate estate, the principles of equity will validate such act, but beyond this limit she is not discovert, and cannot bind herself or her possessions.

Nor do I think that the principle which would remove from the present case, and from analogous cases, the disability of the married state, would be a wise or politic regulation. Few women have, or are likely to have, business habits or training. From their habits in life they are necessarily exposed to imposition. They must rely mainly upon others with respect to the legal effect of their acts. To give to such an inexperienced body of persons the right to endorse notes, to accept bills, and to become surety on bonds and other instruments, under the urgency of their husbands, or from the importunities of their relatives or friends, would not be a boon, but a calamity. In my opinion there is nothing in the general doctrines appertaining to the subject, that should compel this court to concede the existence of the power in question, nor is there any consideration of public policy which seems persuasive of such a concession. I agree, therefore, with the Chancellor, as to the general principle, that a court of equity will not effectuate the contract of a married woman, not founded on a valuable consideration, binding her as surety for another.

I have reached this conclusion without drawing any of my reasons from the provisions of the statute of this state for the better securing the property of married women. The entire effect of that act is, according to my construction, to create in favor of the married woman that kind of estate which would result if these same statutory words were inserted in a deed or a will. The words here used are technical, having long been in use, and their meaning and legal effect have been, in most respects, fully established. They should have the same force whether found in a private instrument or in a public statute. There is nothing in the context of

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this act to modify their usual and recognized signification. The purpose of the law is entirely effectuated by putting in the wife that title to her property which is so well known to equity under the designation of her separate estate. It would certainly seem to be greatly incongruous to have two rules of construction appertaining to the same language, the one to be applied to estates limited by settlement, and the other to estates arising, by force of the same terms, under the statutory provision.

But, although my examination of this subject has led me, with respect to the general principle involved, to the same conclusion as that reached by the Chancellor, I find an ingredient in the case which has a controlling effect, and which appears to have escaped attention.

There are facts stated in this bill, and which, consequently, are admitted by this demurrer, which show that the female defendant had a personal interest in raising the money for which this note was given. The circumstances thus shown are these: That one Edwin Post, the payee of the note in question, held a mortgage against *both these defendants, husband and wife*, on certain lands of the husband; that the money secured by this mortgage was the sum of \$10,000, and that this note was given to the mortgagee in part payment of the encumbrance, and in consideration of its assignment to one Pardee. The language of the bill in regard to these particulars is not as full or clear as it should be, but by a rational construction of it, the facts which I have stated sufficiently appear. The case, then, is this: A mortgage on the lands of the husband, is held against husband and wife, and they unite in giving a note to raise money to pay off, in part, such encumbrance. Now, I think it is clear that in such a transaction a consideration moves to the wife, for she has a valuable, though contingent, interest in the property of her husband, which interest is encumbered by this mortgage, and the money borrowed was to be applied so as, in some degree, to exonerate such interest. In testing the wife's right to act as a feme sole, the only question is whether she is

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to derive any benefit from the transaction, for if such benefit is to accrue, her right to bind herself is unquestionable. In the absence of fraud or imposition, this court cannot attempt to measure the adequacy of the interest which has induced her action. Whenever her property or rights are involved she has a competency to contract, and consequently must decide for herself as to the value of that which she will acquire by an outlay of her money, or as an equivalent for her engagements. The rule, of necessity, must be universal, that in all cases where the act of the feme ensues directly to her own benefit, and she, expressly or by implication, binds her estate, a court of equity will enforce such obligation. In the present case, as the act of Mrs. Elliott was beneficial to herself as well as her husband, it is not in her power to repudiate it. She does not stand here as a mere surety, but as a party having a purpose to subserve by entering into the contract in dispute. It is impossible to conjecture how far her own interest may have been the motive to her conduct, but it is enough to know that the effect of her contract was of possible benefit to her. As then the act of the married woman in giving the obligation sued on, was founded on some consideration valuable to herself, I can perceive no reason why the manifest justice of this case cannot be reached by the enforcement of this contract.

On this latter ground I shall vote to reverse this decree, and to give to the complainant the relief prayed for.

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DAL-
RIMPLE, DEPUÉ, LATHROP, OGDEN, SCUDDER, WALES,
WOODHULL. 10.

For affirmance—NONE.

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Richards v. Green.

RICHARDS, appellant, and GREEN, respondent.

1. An unilateral contract will in no case be enforced in equity, unless, at the time of the decree, both parties can be bound by it.

2. A *feme covert* cannot obtain a decree for a specific performance of a contract which is not binding upon her.

3. A vendee of land went into possession under a parol agreement to purchase. Afterwards, with his assent, a written promise was given by the vendor, with the consent of the vendee, to convey the premises upon the original terms, to the latter's wife. Specific performance was decreed.

The opinion of the Chancellor is reported *ante* p. 32.

Mr. C. F. Hill, for appellants.

Mr. Frederick Stevens, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This is a bill for specific performance. The complainants set forth two agreements, the first being oral, whereby the defendant agreed to sell and convey to the complainant, Joseph Green, a certain house and lot, for the sum of \$2500, of which consideration the amount of \$500 was to be cash, and the residue secured by bond and mortgage. The record of the agreements above referred to was alleged to have been made about a year after the prior agreement, and was in writing, being in the words following, viz.: "This is to show that I agree to sell to Mrs. Capt. Green, house and lot No. 71 Ferry street, for the sum of two thousand five hundred dollars, and that when there is five hundred dollars paid, and the back rent, I will give her a deed and take a mortgage for two thousand." This instrument is signed by the defendant.

A tender of \$500, and of a bond and mortgage for the

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residue of the consideration money, being made to the defendant, he refused to convey the premises in question.

Part of the argument before this court was directed to the question whether this written agreement was of such a nature as to be enforceable in a court of equity. It was said by the counsel of the defendant that this agreement, being made with a married woman, who is incapable of contracting with respect to the purchase of property, was not mutual; that it was entirely unilateral, and that while it was insisted that the defendant was bound by its stipulations, the complainant, Mrs. Green, was free from all obligation to perform it. If this contract is to be regarded as made with a married woman having no separate estate, and therefore under the usual disability of coverture, both at law and in equity, it appears to me that this objection would be clearly tenable. It is true that there are exceptions to the rule that a court of equity will not perform unilateral contracts, as, for instance, in those cases where an agreement which the statute of frauds requires to be in writing, has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which it does not confer upon the other, an example of which is exhibited in the instance of a lease for years which gives an option to the lessee to purchase during the term. But it will be observed that when such contracts come to be enforced in equity, they cease to be unilateral, for upon filing the bill, the party who was before unbound puts himself under all the obligations of the contract. By his own act he makes the contract mutual, and the other party is enabled to enforce it. The consequence is, that in every case that I can find, where specific performance has been ordered, a mutual remedy existed upon it at the time of the rendering of the decree. It seems to me that the rule is universal to this extent, that equity will not direct a performance of the terms of an agreement by the one party, when, at the time of such order, the other party is at liberty to reject the obligations of such agreement. In the present instance, if we look upon the female complainant as incapa-

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ble of incurring the obligations of this contract, she would be at liberty to reject any performance on the part of the defendant that might be decreed in her favor, and there would be no method by which she could be compelled to yield to the terms of the contract on her side. Such a posture of parties does not seem to me equitable. I find no case which warrants such a result. A pointed illustration of the opposite rule is afforded by the judgment of the court in the case of *Flight v. Bolland*, 4 Russ. 298. That was a suit for a specific performance of a contract by an infant, and the bill was dismissed, with costs, on the ground that he was neither originally bound by the contract, nor by the filing of the bill by his next friend. The principle of this case is completely applicable to the present bill, so far as relates to the contract made with the feme covert.

In avoidance of this objection an ingenious attempt was made by the counsel of the complainants to convince the court that Mrs. Green was, with respect to the transaction in question, to be regarded as a feme covert possessed of a separate estate. At the time she received the written contract from the defendant, she paid him \$100, and the argument is that this was her own money. But this was the money of her husband, and it did not cease to be his until it came to the hands of the defendant. So the \$500 which was subsequently tendered belonged to the husband, and there is no ground on which the idea of property in the wife, in such money, can be rested. This latter money was never even in her hands nor in anywise under her control. I think the facts plainly show that the husband was to pay for the premises in question, and that all the money either paid or tendered for that purpose was his own, and that no part of it can be said, without putting an undue force upon the evidence, to have constituted a separate estate in the wife. The case, as I think, cannot be safely put upon this ground.

But there is another view of this case.

I think it appears from the pleadings and evidence, with sufficient certainty, that the complainant Joseph Green en-

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tered into the possession of these premises under the agreement of the defendant to sell and convey them to him. I observe that the defendant, in his examination as a witness, has denied this fact, but such denial is in strange contrast with the statements in this respect of his answer. It would be difficult to frame a more positive and circumstantial assertion or admission of the circumstance in question than is to be found in the answer of this defendant. In the clearest terms it sets out the parol contract that the complainant was to pay him a certain rent for a year, and that he, the defendant, upon the performance of certain conditions, was to convey the property to the complainant; and it then avers in this language, "that under this last-mentioned agreement, and under or on no other agreement, terms, and conditions, the said Joseph Green entered upon and took possession of the aforesaid premises, and he has held possession of the same, and continues to hold possession thereof at the present time." After so explicit a declaration, the subsequent oath of the defendant is entirely impotent to bring the matter in doubt. I am entirely satisfied that the complainant did go into possession of these premises under an agreement for a title, and that consequently the statute of frauds cannot, in a court of equity, have any application to the transaction.

The only difficulty is to ascertain, to the requisite certainty, the terms of the agreement thus in fact executed. The defendant insists that it was a condition precedent to the conveyance of the property, that the complainant should refrain for a year from the use of intoxicating liquors. This is denied by the complainant, and I am satisfied that although it is highly probable that at the time of the negotiations between these parties, some reference was made to the occasional intemperance of the complainant, and it may be that he even promised to refrain from such vice for the time specified, still such subject did not enter as a stipulation into the bargain between these parties. This, I think, is conclusively manifest from the absence of all reference to the matter in the agreement as it was reduced to writing, at the time that it was

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agreed that the wife should take the title. I cannot find that there is the slightest ground to suppose that the bargain was altered on that occasion in any respect, except with reference to the grantee. The husband consented that the wife should take the title, and the defendant accordingly wrote out the terms on which he was to convey such title to her. He does not even himself pretend that he made any new agreement, and he is entirely unable to give any satisfactory reason why, in this paper, he omitted the stipulation which he now insists was one of the conditions on which his promise to sell and convey were dependent. In my judgment, this agreement, as written out by the defendant himself, should be taken as conclusive as to the terms on which this property was to be conveyed. This view removes all difficulty from this branch of the case.

With respect to the objection that the agreement is imperfect, inasmuch as it does not appear when the mortgage which is to be given for the balance of the consideration money is to be payable, I concur with the opinion expressed in the Court of Chancery. Where nothing is said about a credit to be given, and there are no circumstances from which an inference can be made that it was the intention of the parties that the time of payment should be postponed, the money is payable immediately.

Mrs. Green is entitled to a conveyance. The reference to the master should be broad enough to ascertain if any part of the purchase money has been paid.

The decree should be affirmed, with costs.

For affirmance—BEASLEY, C. J., BEDLE, CLEMENT, DALRIMPLE, DEPUE, DODD, LATHROP, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WOODHULL. 12.

For reversal—NONE.

Zabriskie v. Wood.

NOVEMBER TERM, 1872.

ZABRISKIE, appellant, and WOOD, respondent.

1. Where there is a limitation to the issue of the body, followed by the addition of a limitation to the heirs general of such issue, such addition will not prevent the word "issue" from operating to raise an estate tail.

2. The tenth section of the act relating to descents does not apply to estates limited in special tail.

3. The whole practical effect of this clause seems to be to abolish the rule in Shelly's case, when an estate is given for life, with a remainder to the heirs general of such donee.

4. Every kind of estates tail are regulated by the eleventh section of said act.

The grounds of the decree made in the Court of Chancery in this cause are fully set forth in the following opinion, delivered in that court by

THE VICE-CHANCELLOR. The bill in this suit is to enforce the specific performance by the defendant of his agreement to purchase of the complainant an equal undivided fourth part of certain lands in the county of Hudson. The agreement calls for the conveyance of an unencumbered and indefeasible fee simple estate. The demurrer alleges that the complainant's estate, as set forth in the bill, and which he offers to convey, is not such as the contract requires. Whether it is or not, depends upon the true construction of the will of Jasper Zabriskie, deceased, who was the great grandfather of the complainant, and in 1828 died seized of the lands in dispute. His will was duly proved the same year, and that part of it from which the complainant's title is derived disposes of the lands in question as follows:

"I give, devise, and bequeath to my son Michael for life, and to such lawful issue of his body as he may have by any after-marriage, their heirs and assigns forever, the house, &c.

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(describing the lands). Should my son Michael die without leaving such issue, then I give, devise, and bequeath the said lands to the lawful issue of my grandson Albert, their heirs and assigns, forever. Should my grandson Albert die without leaving such lawful issue, then I give, devise, and bequeath the said lands to the lawful issue of the body of my grandson Jasper Garretson, their heirs and assigns, forever. Should his (Jasper's) line fail, then I give, devise, and bequeath the said lands to my own heirs, their heirs and assigns, forever, according to the law of descents of New Jersey in force at the time of my decease."

The testator's son Michael, to whom the devise is first made, was the father of Albert, and died in 1855, without having contracted the after-marriage spoken of in the will, and without having had any children except his son Albert, who is still living. Albert had eight children living at the death of his father. The complainant is one of these eight, and claims title to the undivided fourth part in two ways, asserting, *first*, that upon Michael's death the title vested in Albert; that he afterwards conveyed to his son Michael A., who afterwards conveyed to his brother, the complainant; and, *second*, that if upon Michael's death the title did *not* vest in Albert, it vested in his eight children then living, each of whom took an undivided eighth part, whereby and by means of the conveyance from his brother Michael A., the complainant became the owner of one-fourth. The defendant, by his demurrer, admits the conveyances, but denies that the complainant, if seized at all, is seized of an *indefeasible* estate.

The complainant's first insistent is that upon Michael's death the title vested in Albert. It is not claimed that this was the testator's intent, or that it follows from the words of the will, understood in their ordinary untechnical sense. On the contrary, it is perfectly clear that the intent was directly the opposite, and that both the intent and the natural import of the words would exclude Albert from thus acquiring any interest in this portion of the testator's estate. But the insistent is that the *law* gives to the words a meaning and effect

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to which their ordinary import must yield, and the argument in support of this insistent is based on the first and second sections of "An act further regulating the descent of real estate," passed the 13th of June, 1820, being sections 10 & 11, *Nix. Dig.*, (4th ed.,) p. 237.

The first of these sections enacts that in case any lands "shall hereafter be devised by the owner thereof to any person for life, and at the death of the person to whom the same shall be so devised for life, to go to his or her heirs, or to his or her issue, or to the heirs of his or her body, then and in such case, after the death of such devisee for life, the said lands shall go to and be vested in the children of such devisee, equally to be divided between them as tenants in common in fee, but if there be only one child, then to that one in fee."

By the second section, when a conveyance or devise vests an estate which, under the statute of the thirteenth of Edward the First, would have been held an estate in fee tail, the grantee or devise takes an estate for life only, and the lands afterwards go to the children, as is in the preceding section directed.

The words of this devise, "to my son Michael for life, and to such lawful issue of his body as he may have by any after-marriage," do not bring it within the letter of either of the sections. But the statute is not to be confined to mere identity of words. The first section was held in *Den v. Demarest*, 1 Zab. 538, to counteract entirely, so far as devises are concerned, the operation of the rule in Shelly's case, and this was declared to be its main end and design. This declaration can only stand upon the ground that the words of the section "to his or her heirs, or to his or her issue, or to the heirs of his or her body," are general terms, and comprehensive of the various words which in any devise would subject it to the operation of that rule. In the same way the words in the second section, "an estate in fee tail," created by the words "heirs of the body," must include every special form which an estate tail can take on. In this view, the object of the first section was, so far as wills are concerned, to abrogate

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the rule in Shelly's case; the object of the second section, to abolish estates tail.

The devise in the present case is, "to my son Michael for life, and to such lawful issue of his body as he may have by any after-marriage." These words cannot create an estate tail except by force of that rule. If they are within the scope of that rule, the devise became liable to the action of each section alike, and an estate for life was by each section vested in Michael, upon whose death his only child, Albert, took the whole estate in fee. In that event, the complainant, by the conveyances, is the owner of the whole indefeasible estate instead of one-fourth, and the demurrer must fall. This construction vests in Albert other lands not included in the conveyances, and which the testator obviously meant him not to have. But if that rule does not attach to the devise, neither section of the statute will affect it, and the intention of the testator will prevail. The rule in Shelly's case was of feudal origin and policy, and was designed to favor the transmission of estates by descent, and prohibit their transmission in certain lines of succession by means of a deed or will instead of by inheritance, according to the course of the law. In that ancient case it was expressed that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate and not words of purchase. By which is meant that the ancestor, or in other words the first taker, takes the whole estate in fee instead of for life, when the words are to his heirs, and an estate tail instead of for life, when the words are to the heirs of his body. This rule was not one of interpretation but of positive law. It did not seek the intention, but in most cases defeated it. Where by fair interpretation of the instrument the expressed intention was not such a disposition as the rule prohibited, the rule did not apply. Where it was, the rule inflexibly interfered to prevent it. The question, when the intention came in conflict with the rule, was often extremely

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difficult to solve. The vast multitude of cases wherein, since 1581, when this rule was laid down, its application has been made matter of judicial decision, forms a most abstruse and perplexing, and now nearly obsolete part of the law. Many of these cases were cited at the argument, and reasoned on with great ability and learning, by the counsel of complainant, to show that the words of the present devise are within the scope of that rule. After the best consideration I have been able to give them, I think this view cannot be maintained.

A single feature of this devise is, in my judgment, a sufficient reason why the rule cannot attach to it. This feature is the addition to the word *issue*, of the words, "their heirs and assigns forever." They are appropriate and technical words to describe a fee simple estate. They are descriptive of a different and larger interest, and one of different descendible qualities from that which such issue would take by virtue of the rule, if these superadded words had been omitted. They import an order of succession different from that imported by the limitation to the issue. They break the succession by making the issue a new stock of descent. This circumstance, as I understand the rule, goes to its rationale and gist. In Preston on Estates, chapter third, in a definition marked by explanatory fullness, the limitation is described as to a class or denomination of persons to take in succession from generation to generation. Where this is not the effect of the words of the devise the rule does not apply, and the testator's expressed intent is carried into effect. Thus in *Doe v. Collis*, 4 T. R. 294, where the devise was of a moiety to A for life, and to the issue of her body, with the superadded words, "and to their heirs forever," the judgment of Lord Kenyon was, A, tenant for life, with remainder to her children in fee. There the estate to commence in and be deduced from the persons who should be the issue of her body, was more extensive than the estate in tail which A would have taken on the supposition that the limitation to her for life, and the issue to her body, gave her the inherit-

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ance. Lord Kenyon said in this case, that in a will *issue* is a word either of purchase or limitation, as will best answer the intention of the deviser. In other cases the superadded words import a less extensive estate, and on the same ground of an interruption in the nature of the succession, exempt such cases from the influence of the rule, and in each case make the words issue or heirs descriptive of the persons who shall take, and their taking to be by purchase and not by descent. This doctrine and its exemplifying cases are set forth in the third chapter, above cited, of Preston on Estates, a chapter exclusively devoted to an exposition of that celebrated rule. On page 352, he says: "Perhaps it will not be too much to assume it as a general conclusion, deducible from the authorities which have been noticed, that the point of difference furnished by the cases, is that whenever the superadded words of limitation do intentionally give a direction to the course of descent, different from that which must take place under the former branch of the gift, so often the words, 'heirs, &c.,' in that branch of the limitation, will be words of purchase and not of limitation." On page 379, he says that "the word *issue* is not *ex vi termini* within the rule in Shelly's case. It is a word of less determinate meaning than the words *heirs of the body*, and in wills depends for its construction more on the intention of the testator, than on the strict rules of the law." See, also, *Hayes' Essay, Law Library*, Vol. VII. ; *Sisson v. Seabury*, 1 Sumner 238 ; *Cruise on Real Property, Title, Devise*, chap. 14, § 24 ; 4 Kent 221.

My opinion is, that the rule in Shelly's case would not, prior to the state of 1820, have attached to the words of this devise, and that, therefore, its legal meaning and effect are exactly what the testator meant them to be, viz. a life estate in Michael, with remainder in fee to his issue by any subsequent marriage. This remainder was contingent, because such issue were not in being when the will took effect. The remainder failed, because Michael died without such a marriage, and thereupon the fee vested in the issue of Albert, being his eight children, then living. I think, also, it vested

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in these eight, to the exclusion of any who might afterwards be born, because, under the rule in such cases, the death of Michael was the period of distribution. 2 *Jarman* 76.

The complainant in this way became seized of one-eighth, and by the conveyance of his brother, of another eighth. The only question remaining is, does any defeasible quality belong to his fourth, thus acquired? The devise is, "should my grandson, Albert, die without leaving such lawful issue, then I give, devise, and bequeath the said lands to the lawful issue of my grandson, Jasper Garretson." The meaning of the words "die without leaving such lawful issue," must be held in this case to be settled by the decision of the Court of Errors, in *Cottheal v. Morehouse*, 2 *Zab.*, note, page 440. They denote a definite failure of issue. The failure of Albert's descendants is a failure at his death. This altered meaning of the words has the effect to sustain the devises over, which would have been bad for remoteness by the law as it stood before that decision was made. If, therefore, at Albert's death, none of his issue should be living, the devise over would carry the lands to the children of Jasper. If the word *leaving* could be construed as *having*, as the complainant contends it should be, the title of the complainant would be absolute. But I can see no propriety in such a construction. The case of *Du Bois v. Ray*, 35 *N. Y. Rep.* 162, and the authorities therein cited and reviewed, where this change of leaving for having was made, are broadly distinguishable from this. In all the cases it is put upon the ground that such a construction is necessary to sustain the validity of the disposition, to make the will consistent with itself, or carry out the testator's manifest intent. In such cases, the primary rule that the plain and unambiguous words of the will must prevail, is applied, in connection with other rules of interpretation, to ascertain what the testator meant. Where the plain meaning of the words leads to results which other sound rules of interpretation forbid, every effort will be made to "manage" the words and keep them in subjection to the sense. In the present case, no such results will be produced

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if the words are strictly adhered to. The effect of the proposed change, besides being advantageous to the present owners of the lands, would make the will, perhaps, a more judicious one, in the opinion of others. It need hardly be said that this circumstance alone is not to be considered. The testator, not the court, makes the will. As said in *Ely v. Ely*, 5 C. E. Green 49, no testator could safely express any intention, if the courts, at their pleasure, could substitute words which would change his direction.

The complainant's estate is not, therefore, indefeasible, and the demurrer must be sustained.

I respectfully advise a decree in accordance with the above.

From the decree so made, the complainant appealed to this court. The appeal was argued by

Mr. L. Zabriskie, for appellant.

Mr. Dixon, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The question is whether the title tendered in the bill is good, and is such a one as is called for by the agreement to purchase. This controversy depends on the legal effect of a certain provision in the will of Michael Zabriskie. The complainant claims that by force of this instrument he has a fee simple in the entire property, or at the least, a fee in the undivided fourth part of the premises, which was the quantity agreed to be sold by him. He further claims that such estate is subject to no contingency and is indefeasible. These are the questions to be settled on this appeal.

The contested declaration of this will is in these words, viz: "I give and bequeath to my son Michael, for life, and to such lawful issue of his body as he may have by any after-marriage, their heirs and assigns forever, the house, &c., (de-

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scribing the lands.) Should my son Michael die without leaving such issue, then I give, devise, and bequeath the said lands to the lawful issue of my grandson Albert, their heirs and assigns forever. Should my grandson Albert die without leaving such lawful issue, then I give, devise, and bequeath the said lands to the lawful issue of the body of my grandson Jasper Garretson, their heirs and assigns forever. Should his (Jasper's) line fail, then I give, devise, and bequeath the said lands to my own heirs, their heirs and assigns forever, according to the law of descents of New Jersey in force at the time of my decease."

Michael, the son of the testator, died without leaving issue by the designated marriage; Albert, the grandson, is still living and has eight children, of whom the complainant is one. It also appears in the case that the complainant has, through mean conveyances, all the interest in the lands, if any such accrued, which came by virtue of the foregoing testamentary provision to his father Albert, and this condition of the case gives occasion to the inquiry above stated, whether or not the complainant has an estate in fee simple in the premises embraced in the bill of complaint. This contention stands upon these grounds: that the devise to Michael, the grandfather of complainant, is a fee tail; that by force of the statute of this state regulating the descent of lands, such an estate was converted into a life estate in the grandfather, and into a remainder in fee in Albert, the son, and that such fee, by the conveyances just mentioned, is now vested in the complainant. The title thus deduced was not approved of in the Court of Chancery, it being there decided that the devise in question did not create an estate tail. It was conceded that the words, "I give, devise, and bequeath to my son Michael, for life, and to such lawful issue of his body as he may have by any after-marriage," standing alone and unexplained, would, by virtue of the rule in *Shelly's* case, have created a fee tail, but it was considered that the subsequent words, limiting forever the estate to the "heirs and assigns" of the issue of the body, showed a clear inten-

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tion that the estate was not to pass by way of indefinite succession to the lineal descendants.

It is certainly clear that this devise, in the absence of the words which were deemed explanatory of the previous limitation, would, in view of a rule of law, entirely settled, have given a fee tail to Michael, the son of the testator, and his issue by the designated marriage. It was said that such a limitation would have fallen under the regulation of the tenth section of the act relating to the descent of lands. *Nix. Dig.* 237. But as the estate thus formed would have been an estate tail special, being confined to the issue by a subsequent marriage, that clause of the act would have been wholly inapplicable. It is true that in order to bring this section into force it is not necessary that the verbal description of the estate in the will must correspond with the verbal description of the statutory subject, but the two things in point of fact must be the same. This provision in the act, construed according to the unobscure meaning of its plain terms, and giving to them their common law effect, embraces nothing except estates tail general, arising by devise. Its language is: "In case any lands, &c., shall hereafter be devised by the owner thereof to any person for life, and at the death of the person to whom the same shall so be devised for life, to go to his or her heirs, or to his or her issue, or to the heirs of his or her body, then, and in that case," &c. The subject to be regulated is, in these terms, very plainly described. It is a life estate in the first devisee, with a remainder to his lineal descendants in indefinite succession. It, therefore, does not apply when the limitation is only to a particular class of lineal descendants, which is the present case. But it does not seem to me that this construction can have any important influence in the application of this statute to the present, or to any other testamentary disposition which relates to estates tail. I have not been able to discern that there can arise any case in which this tenth section of this act can have, in such respect, any practical effect whatever. It has been said by Mr. Griffith, that the purpose of the

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clause was to abolish the rule in Shelly's case; but it is manifest that it can effect this end only to a limited extent, as it does not relate to estates tail, arising by force of such rule out of the limitations of a deed, nor to estates tail special. However, I suppose there can be no doubt that the design was to control the rule in this limited degree. But the difficulty is to perceive the use of such a control over the creation of estates tail, because, if the rule is allowed to remain, and an estate tail should come into existence under its operation, the result will be, in point of fact, the same as though the rule had been rendered inoperative. In every case in which an estate tail arises, the eleventh section of the act disposes of it in the same way as it is disposed of in the tenth section, that is, it gives a life estate to the first taker, and a remainder in fee to his children, in equal shares. In point of utility the former of these sections appears to me to be a nullity, except where there is a devise to a person for life, with a remainder to his heirs in fee. This was the case in *Den ex dem. of Hopper v. Demarest*, 2 Zab. 599. But if the present devise produces an estate tail, it will be subject, not to the regulation of the tenth, but to that of the eleventh section of the statute in question.

I have already said that it is obvious that, if this devise had limited the estate to Michael for life, and to the issue of his body by any subsequent marriage, an estate tail would, according to the rules of the common law, have arisen. The only subject of inquiry, therefore, is, as to the legal effect of the words superadded to the clause, giving the estate to the special issue of the body.

This problem is not, of course, susceptible of a demonstrative solution. Like most of the questions belonging to this branch of the law, it has been obscured by subtle distinctions and over-nice refinements, and rendered intricate by judgments which it is difficult, if not impossible, to harmonize. The proposition on which the decision in the Court of Chancery is grounded is, that where a devise gives an estate to a person for life, and to the issue of his body, the addition to

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a limitation to the heirs general, forever, of such issue, will prevent the words "issue of the body" from operating, according to their technical effect, to give an estate tail. The argument for this conclusion is, that this limitation to the heirs general of the issue, is not consistent with the order of the devolution of an estate tail, and that it, consequently, appears that it was not the intention to create such an estate.

This general proposition is explicitly controverted by Mr. Jarman, in his *Treatise on Wills*, Vol. II., p. 246, and he appears to consider that the opposite rule is now settled by the authorities. His language, in this particular, is: "It is also established that the addition of the limitation to the heirs general of the issue, will not prevent the word 'issue' from operating to give an estate tail as a word of limitation." A more recent writer, Mr. Hawkins, has drawn a similar conclusion from the adjudged cases. *Hark. on Wills*, p. 185. Each of these authors cites a line of adjudications in support of the view entertained by him, and this array of authority is certainly imposing. But I have also found a line of decisions adopting the opposite view, and some of which are of great weight. I shall not attempt any comparison or review of these conflicting opinions, as from the view which I take, such a course would subserve no useful purpose. I will simply remark that, in my judgment, the authorities referred to do not put this question entirely at rest. It is proper, however, to say that the preponderance of opinion is in favor of the rule indicated in the text books above quoted. But, as I find the point still in suspense, there being a line of decisions sustaining each side of the question, and, as it seems to me that there exists no consideration of such paramount weight as to incline the mind, of necessity, either way, I should have been unwilling to dissent, under the force of these influences alone, from the view already expressed in this case. But my attention has been called to a decision in the Supreme Court of this state, which is directly in point, and which does not appear heretofore to have been presented for judicial consideration in the progress of this suit. *Den. v. McPeake*, Penn.

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291, is the case to which I refer. The question was raised on the language of a deed, which the report states was to this effect: "Unto Susanna McGennis, for her support during her natural life, and after her decease, to the heirs of her body, and *to their heirs and assigns for ever.*" It will be thus observed that the superadded words were the same as those employed in the present devise, and their effect was the principle subject of inquiry. The point was thus disposed of, the language of the opinion being: "The subsequent words, *and to their heirs and assigns*, are either merged in the preceding words, limiting the estate to the heirs of her body, or are too uncertain to control them. There are cases of devises where the testator hath superadded fresh limitations and grafted other words of inheritance upon the heir to whom he gives the estate, whereby it evidently appeared that these heirs were meant by the testator, to be the root of a new inheritance, and not considered as branches derived from their own ancestor. But I do not consider the present case as coming within any of them."

There are but two differences between the case thus decided and the one now under consideration. In the reported case the estate was created by deed, and the words of the first limitation were, "to the *heirs* of the body;" in the present devise the expression is, to the *issue* of the body. But although the words "issue of the body" have been sometimes held to be terms of less inflexibility than the term, "heirs of the body," I do not find that they have been so received with respect to the present superadded phrase. Nor do I think that these engrafted terms ought to have, in the same connection, a construction in a deed different from what they will bear in a will. This case in the reports of Mr. Pennington is too closely apposite to be disregarded on this occasion. There is no ground on which it should be overruled. It has stood in our reports, apparently unquestioned, since the year 1807. Gentlemen of the profession had a right to rely on it in giving advice to their clients, and it is probable that titles have been sold and purchased on its authority. To create a

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fanciful distinction between this case and the devise now open for construction would involve the subject in obscurity and perplex it with doubts, while it is important to have the legal effect of the terms in question plain and easily comprehensible. It is on this account I conclude that the super-added words should not have the force which has been attributed to them.

The result is, that in my judgment, by force of the testamentary clause now considered, Michael, according to the principles of the common law, would have been seized of an estate tail, and that consequently, under the operation of the eleventh section of the statute in question, he became the owner of a life estate, with a vested remainder in fee in his son Albert. As the case shows that the complainant has the title of his father by force of a conveyance, such title is good, and the defendant should take the premises in compliance with his agreement to that effect.

The appellant is entitled to judgment in this court.

Decree reversed.

For reversal—BEASLEY, C. J., DEPUE, OLDEN, SCUDDER, VAN SYCKEL. 5.

For affirmance—BEDLE, DALRIMPLE, OGDEN, WOODHULL. 4.

JONES and wife, appellants, and TRUSDELL, respondent.

1. A promise to extend the time of the payment of a mortgage, such promise being in consideration of a note given for a usurious premium, is void.

2. A mortgage being due, the mortgage^{ee}, in consideration of a note in the sum of \$500 given by the mortgage^e, promised to give time for the payment of the principal debt. *Held*, that such promise was not binding, and that the mortgage could be foreclosed before the expiration of such extension.

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The bill is filed to foreclose a mortgage dated April 1st, 1869, made by Henry A. Jones and wife to Samuel A. Meeker, one of the defendants, for \$14,000, payable on the 1st of April, 1871. About the time the mortgage fell due, a parol agreement was made between Meeker and Jones for the extension of the time of payment of the principal. It was agreed that the principal should not be payable till April 1st, 1872; and as the consideration therefor, Meeker took from Jones his note, dated April 3d, 1871, for \$500, payable in fifteen months. On or about the 22d of the following July, Meeker assigned the mortgage to Trusdell, the complainant, who had no notice of the agreement, and took the mortgage as then due and payable. To his present bill, Jones and wife have answered, alleging the above agreement, and insisting that by virtue of it the mortgage debt is not yet due. This was an appeal from a decree in favor of the complainant, made in pursuance of an opinion of the Vice-Chancellor, reported *ante p.* 122.

Mr. Cumming and *Mr. Hill*, for appellants.

Mr. McCarter, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This was a foreclosure bill on an assigned mortgage, and the defence insisted on is, that at the time of such assignment the mortgagee had agreed to extend the time of payment, and that such time had not elapsed when the suit was commenced. That such an agreement, if valid, would attach to the mortgage and follow it into the hands of the assignee, is a principle too well settled to need consideration. The single question in the case is the one embraced in the argument of counsel, viz. whether the contract for further forbearance was legal.

The fact of the existence of a contract to the effect claimed was not denied on the side of the complainant; but the

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argument in his behalf went upon the ground that such contract was invalid for want of a consideration to support it. The point of this objection was that such consideration was tainted with usury. The evidence is clear as to the existence of such taint. The mortgagor gave his note in the amount of \$500, in consideration of the promise to extend. At the time the mortgage was assigned, and when the bill was exhibited, the note was not mature, and was still in the hands of the mortgagee. It is obvious that if this \$500 had been paid in cash while the mortgage remained the property of the mortgagee, by force of the supplement to the act against usury, approved April 12th, 1864, as construed in the case of *Nightingale v. Meginnis*, 5 Vroom 461, it could not have formed any ground on which a promise could rest, as its legal effect would have been to pass as a payment in extinguishment, in part, of the debt then due. But in point of fact no money was paid, and the agreement for further forbearance had no basis except a promise to pay, in the future, a specified bonus. It is clear that the promise to pay this premium was void by virtue of the statute entitled "An act against usury," *N.Y. Dig.* 437. No part of the money embraced in the note given for \$500 would have been recovered. No suit would have lain upon it. It could not, consequently, constitute a legal consideration for a promise.

But it was argued, in obviation of this objection, that the complainant who represents in this matter the mortgagee, could not set up this defence, and the ground of the reasoning was, that it was the privilege of the borrower alone to take advantage of the usurious taint of the contract. In support of this the case of *Billington v. Wagoner*, 33 N. Y. Rep. 31 was cited. That judgment was rendered by a divided court, and I am by no means prepared to concur in the result reached by the majority of the judges. I think the true rule of law upon the subject is, that the court will not help either party to enforce a usurious contract while it remains executory. The statute declares it void absolutely, and without regard to the fact whether the usury is shown by the bor-

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rower or the lender. After the contract is executed, the law leaves the parties in the attitude in which they have placed themselves. But even the case cited will not support the theory of the defence in the present instance, for that decision is rested on the distinction that while an executory promise to pay usury will not uphold a contract for the forbearance of a debt, an actual payment of such usury will be legally effective for that purpose. It is clear, therefore, that even this rule of judgment is adverse to the defence now interposed.

From these considerations, I conclude that the giving of the usurious note in question cannot be set up by the defendant as a consideration of the promise to extend the time of the payment of the debt, and that, on this ground, there was nothing to prevent the immediate foreclosure of the mortgage in question.

Whether the subsequent payment of this note to the mortgagee after he had assigned the mortgage could in anywise affect the rights of the complainant, being his assignee, has not been considered by this court, as no such question was mooted on the argument.

The decree of the Vice-Chancellor should be affirmed, with costs.

For affirmance—BEASLEY, C. J., BEDLE, CLEMENT, DALRIMPLE, DEPUE, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WOODHULL. 10.

For reversal—NONE.

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Davis v. Vanderveer's Adm'r.

DAVIS and others, appellants, and VANDERVEER'S ADMIN-
ISTRATOR and others, respondents.

1. Under the Statute of Distributions of this state (*Nix. Dig.* 305, §§ 12, 13,) first cousins will take the personal estate of the intestate, to the exclusion of the children and grandchildren of other first cousins deceased. Collateral relatives can not take by representation, except in the case of the children of a deceased brother or sister of the intestate.

2. The effect of the proviso "that no representation shall be admitted among collaterals after brothers' and sisters' children," is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin, *per capita*, except in the one case of the children of the deceased brothers and sisters of the intestate, among whom alone of the collaterals the right to take *per stirpes*, by way of representation, exists.

By a decree of the Orphans Court of the county of Somerset, the surplusage of the personal estate of Dr. Henry Vanderveer, late of said county, deceased, was ordered to be distributed to and among his five *first* cousins.

Certain of the *second* and *third* cousins of Dr. Vanderveer thereupon filed their petition of appeal in the Prerogative Court, setting forth that the said decree was erroneous, for that the said Dr. Vanderveer left him surviving, not only the said five first cousins, but also the petitioners and others, children and representatives of first cousins deceased; and claiming that said children and representatives of first cousins, deceased, were equally entitled to such share or portion of said personal estate, with said first cousins, as their parents would have been entitled to, if living, and that the surplusage of the personal estate of the intestate should not be distributed among the five first cousins, as by said decree adjudged and decreed, but among said first cousins and children, representatives of deceased first cousins, surviving, giving to such representatives of deceased first cousins the share or portion of such personal estate to which their deceased parents would have been entitled, if living.

The cause was heard before the Ordinary on a motion to dismiss the appeal.

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Mr. Van Fleet and *Mr. P. D. Vroom*, for motion.

Mr. A. Clark and *Mr. Williamson*, contra.

THE ORDINARY.

The motion to dismiss is on the ground that the appellants, by their own showing on the facts set forth in the petition of appeal, have no interest in the matter, and therefore no right to appeal.

The distribution ordered, was to the first cousins of the intestate, who survived him. The appellants are children of the other first cousins, who died before the intestate.

The proviso in the thirteenth section of the act concerning executors and administrators, "that no representation shall be admitted among collaterals, after brothers' and sisters' children," is taken from the English statute of distributions. That this applies to the descendants of all other collaterals, as well as to the issue of brothers and sisters, beyond their children, has been held in repeated decisions in England, and has been adopted by the courts of this state, and by the bar as the settled law. It ought not now to be questioned in any court here below that of the last resort.

If it is desired to have the decision of the Court of Appeals, an appeal can as well be taken from the order to dismiss, as from a decree on the hearing. The appeal must be dismissed.

From the decree of the Ordinary, dismissing said appeal, an appeal was taken to this court, and argument was thereupon had by

Mr. F. T. Frelinghuysen, (with whom was *Mr. Williamson*,) for appellants.

Dr. Henry Vanderveer died intestate, a bachelor, being an only child, and having no ancestors living. His nearest relatives are first cousins, several are living, several had died before the intestate, leaving children.

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The question is, what distribution is to be made of the intestate's personal estate.

If some of the first cousins had not died, leaving children, there is no question that the first cousins would take the whole fund. If all the first cousins had died, there is no question that the second cousins would take the whole fund. But some of the first cousins being living, and some having died leaving children, *the question is*, do those children take their deceased parents' share? do they represent their parents?

In making distribution, those in the nearest degree of relationship must be sought. When representation exists, the representatives are held to be in the same degree of relationship as the stock they represent, and they take per stirpes and not per capita. Thus, if an intestate leaves one son living, and two grandsons of a deceased son, the two grandsons representing their father would take in the equal degree of relationship with the son (their uncle,) and would take half of the fund; they take according to their stock, per stirpes, not each for himself, so much a head, or per capita. If they take per capita, each of the two grandsons would take one third; but taking by "representing their stock" per stirpes, they divide their father's share between them, each grandchild taking one-fourth of the fund, and only the share that would have come to the parent, is divided among the children, no matter how many there may be; so that those in the same class with the parent, suffer no diminution of their share by the death of the parent; the parent's share goes to his children, and not to his collaterals.

So if an intestate leaves no children and no brothers or sisters, no uncles or aunts, then first cousins are the nearest relatives. We, the appellants, say that the children of deceased first cousins represent their stock and take their parents' share; the respondents say no, the first cousins living take the whole fund, to the exclusions of the first cousins' brothers' and sisters' children; *that is the question.*

That what we claim may present itself to the favorable

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judgment of the court, we put our claim in the plain and clear words of the statute: that when there be no widow and no child, and no brothers or sisters or their children, distribution is to be made to "the next of the kindred in equal degree, of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever." *Nix. Dig. (4th ed.)* 305.

It seems strange that when our claim is within the plain words of the statute there should be any necessity for argument.

But doubt is cast about this statute; first, because it has seldom if ever occurred in our state that one has died intestate, leaving a considerable personal estate, without having had wife or children, brothers or sisters, and without leaving ancestors, and consequently the question whether there is "representation" among cousins has never been here adjudicated; and secondly, doubt is cast over the plain words of the statute because, as the statute has its origin in the Civil or Roman law, and as representation was not allowed in that law among collaterals, except in favor of brothers' and sisters' children, it has been assumed in the treatises of law writers and by the dicta of courts that "representation" among collaterals is, under the statute, excluded except in favor of the children of brothers and sisters; and this has been so held in defiance of the plain words of the statute. If there were no sweeping propositions laid down by the writers of treatises on this subject, if there were no dicta by judges going beyond the case they were called upon to decide, this court would decide by simply reading the statute, that where first cousins are the "next of kindred unto the intestate" distribution is to be made to first cousins or to the legal representatives of first cousins.

I must show the court what these propositions of authors are, their error, how they originated, and how they are beginning to be disregarded and overruled in England and in this country, and then we will get a fair and rational construction of the statute.

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If the court will disregard and overrule the propositions of authors, the unauthoritative dicta of judges in regard to the last clause of this statute, on which we base our claim, in the same manner that other courts have disregarded and overruled such propositions and dicta after they have been received a hundred years, then the court will construe the statute according to its words and true meaning, and in harmony with the other laws of our state; and will decide that when one dies without will, leaving one first cousin and two children of another first cousin, that the two children representing their stock stand in equal degree of kindred to the intestate, and take their parent's share, as the statute says they shall, when it provides that distribution shall be made to the "next of kindred in equal degree and their legal representatives," and will not decide that a first cousin shall take by survivorship his brother's share away from his children.

I shall first show what the civil law relative to distribution is, and how it is modified by the statute, and that the treatises and dicta of the courts are plainly opposed to the statute and in many respects to the civil law itself; and shall then call attention to the statute, showing that as plain as words can express, it declares that "representation" shall exist among cousins; and shall insist that this court cannot follow the treatises or the dicta, but must obey the statute.

I. Let me call attention to the civil law on this subject and to the origin of this statute.

By the old Roman law "representation" according to the stock in the distribution of estates was allowed among *descendants*, lineally, *ad infinitum*. So that if a man died intestate, leaving one grandchild by one deceased child, two by another and three by a third; the grandchildren all took *per stirpes* and not *per capita*; and the principle applied to great grandchildren and any other descendants.

This was the old Roman law. *Gaius' Institutes*, (the oldest law book extant), p. 434, *sec.* 8; *Cooper's Justinian*,

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(the Institutes), p. 194, sec. 6. This doctrine of representation does not seem under the old Roman law to have extended in any degree or manner to collaterals, when the succession went over to them; and the reason seems to have been, that when the direct heirs failed they looked for a master to the estate of the same name and blood as the deceased; therefore the law of the XII tables enacted, that if a man died intestate, without heirs of his own, his next relation on the father's side (agnatus proximus) should have the estate. See XII Tables, *Cooper's Justinian* 659.

The object seems to have been similar to the old Hebrew law to keep up the family name and estate, which was then effected by directing a brother to raise up seed to his deceased brother. Hence in those primitive days when collaterals were called to take, the reason for representation did not exist. The collateral might, as in this case, be of different name from the intestate. He might not descend from the male relative, but from the female line, from a married sister and not from a brother. To inherit, the collateral must have been of the same name and a brother or his descendants. The law as to requiring the collaterals to come from a brother was however modified so as to extend to collaterals who come from a sister, but "representation" among collaterals was not allowed. *Justinian's Institutes*, Cooper, p. 207, sections 4 and 5; *Gaius*, p. 436, sections 15, 16, 17.

Therefore while "representation" was found in the most ancient laws of Rome, it seems to have been confined to descendants, and did not extend to collaterals at all. This law was afterwards modified.

The old law of Rome is found in the Digests of which there are some fifty volumes. They contain what may be called the common law of the Romans.

The code of the Emperor Justinian in twelve books, was prepared about 550 years after Christ, by a board of lawyers, and submitted to Justinian, who, by his fiat, made them statutes which declared or modified the then existing law. The Institutes was a mere student's book.

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After the code was made, Justinian still kept the lawyer board in existence, and they would from time to time submit new statutes "*Constitutes Novellae*," or the "*Novels*." There are 118 *Novels*, and were adopted about 543, after Christ. Chapter 1 clearly states the existing law as to "*representation*" in the case of descendants, and chapter 3 of same *Novels* extends it for the first time to collaterals, and is the foundation of the statute of Charles II. *Cooper's Justinian*, pp. 394—399.

There we find that the old Roman law allowed representation *ad infinitum* in the case of descendants, and allowed no *representation* whatever among collaterals, but required the nearest relative of the intestate descending from his nearest male relative, to take.

The *Novel* of Justinian reaffirmed "*representation*" as to descendants, abolished the requisite that the collateral should be in the male line, and extended "*representation*" to brothers' and sisters' children.

It is stated in treatises and by the dicta of courts that the civil or Roman law does not recognize "*representation*" beyond the second degree of *lineal* descendants, and assuming such to be the civil law, and that this statute of 22d Charles II. is taken from the civil law—the civil law, as it is assumed to be, has been administered, and not the statute; and it is both an error to suppose such to be the civil law and an error to suppose that the statute is simply declaratory of the civil law; and in direct defiance of the statute it has been held by the authors of treatises and dicta of judges that there is in the distribution of personal property no representation in the *lineal* line. Thus it is held that where one dies intestate, leaving a great granddaughter descended from his deceased son A, and four great grandsons descended from his son B, the fund is not to be distributed to them as representing their stock—*per stirpes*—so that the great granddaughter should take one moiety and the four great grandsons the other moiety, but it is held that representation

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ceased with the grandsons, and these five great grandchildren take per capita, each one-fifth of the fund.

This is so held by Toller on Executors, which has been the accepted text-book on the subject, for perhaps one hundred years. *Toller on Executors*, (7th edition by Whitmarsh,) p. 374; *Williams on Executors*, vol. 2, p. 1347; *Griffith's Law Register*, vol. 4, p. 1257.

These dicta are as repugnant to the statute as to the civil law, which enacts, section 13, that one-third shall go to the widow, and the residue to the children, and such persons as legally represent the children.

I do not suppose there is a member of this court, who would so administer the law; and yet there is as much authority for so doing as there is for holding that representation does not exist among cousins, and under the words of this statute, there is even less reason for excluding representation of cousins than there is of lineal descendants.

Now let me trace the circumstances that gave rise to the statute of 22d Charles II., and see how it differs from the Novel of Justinian which is unquestionably its basis.

The statute was enacted in 1671. Before the Reformation (which was in 1517) the Ordinary, who was Archbishop, Bishop, or Deputy, was entitled to the administration, paid the debts if there was that to pay them with, and kept the surplus. Personal estate was of little consequence: a coat of mail, an oak chair and black cattle (the word chattels comes from the Norman word for cattle,) generally constituted the personal estate.

After the Reformation the law required the Ordinary to demand a bond that the administrator would distribute the surplus *as he directed*.

Afterwards the statute of Edward III. directed the Ordinary to grant administration to the "best friend" of the intestate. It was then claimed that under that statute neither the Ordinary, or any civil court, could compel him to distribute the surplus, and Sir Walter Walker, an eminent

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civilian, drew up this statute to get the estates of intestates beyond the control of Pope, or Bishop, or Roman law. See 6 *C. E. Green*, p. 160, for history of statute.

Sir Walter engrafted on every part of the statute the principle of the English common law which is "representation, lineal and collateral." He undoubtedly had the 118 Novels of Justinian before him (Cooper's Justinian 399.) No one can read the three chapters of that novel, finding the very words and expressions introduced, and doubt that it was the basis of the statute. But while that carefully guards *against* representation among collaterals according to the principle of the civil law, he as carefully provides *for* representation according to the principle of the common law.

II. Now let us look at the statute and compare it with old Roman law and the Novel of Justinian.

A *prefix* to the statute is enacted entirely foreign to Roman law or the Novel, but familiar to the common law, to wit: in section twelfth it is provided that where there is no wife or children there shall be made a "just and equal distribution to the next of kindred to the intestate, in equal degree or *legally representing their stocks, each according to his or her respective rights*, pursuant to the law in such cases, and the rules and limitations hereinafter set down."

The terms "next of kindred" and "stock" are common law words, not civil. 2 *Black. Com.* 224; *Ib.* 234.

Representation is engrafted on the whole statute, subject in the language of the statute "to the rules and limitations hereinafter set down."

Read twelfth section—that word "stocks" and those who "legally represent next of kindred" are phrases that have a meaning in England, and are so introduced. No one under the old Roman law, legally represented a collateral, and under the Novel of Justinian there was only *one case* in which a collateral had a legal representative, and that was the case of a brother or sister, and in that case representation was restricted to his or her children.

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And the appellees now before the court, in order to exclude the children of first cousins who are deceased, in the face of these plain words which stamp representation on the whole statute, say that representation among collaterals only exists as by the civil law, to wit, that children represent a deceased brother or sister.

The statute says distribution *in this case* shall be made to "the next of kindred to the intestate." We both agree that the first cousins are "next of kindred to the intestate."

But the statute says further, that it shall go to the next of kindred "in equal degree, or legally representing their stocks, each according to his or her respective right." The statute contradicts the proposition of the appellees and says, that among "the next of kindred," be they lineal or collateral, "representation" per stirpes, according to "their stocks, each according to his or her respective right," shall exist.

If intestate left one brother living and three children of another brother deceased, the brother takes one-half of the fund, and the three children of the other brother take the other half, because representation according to their stocks, each according to his or her respective rights, exists by the statute. It will not be denied that this is the rule as to brothers and sisters and their children; but the term "next of kindred" includes first cousins as well as brothers (if it does not the appellees have no claim,) and representation is by the statute enacted to exist as to "next of kindred" eo nomine, and not as to "brothers and sisters."

And inasmuch as "next of kindred" includes first cousins as well as brothers and sisters, if the case of first cousins can be distinguished from that of brothers and sisters, as to whom representation is admitted, it must be by reason of the words which follow this general declaration of the principle of "representation," to wit, the words "pursuant to the laws in such cases, and the rules and limitations hereinafter set down."

Now what restriction to this general representation accor-

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ding to stocks, per stirpes, do we find "in the rules and limitations hereinafter set down?"

The statute adopts nearly the language of the Novel in limiting representation as to brothers and sisters. There was no pretence in civil law of representation as to any other collateral, and it says (*Cooper* 400): "But among collaterals, we allow the privilege of representation to the sons and daughters of brothers and sisters, and no further." The statute says: "*Provided*, that no representation shall be admitted among collateral, after brother's and sister's children." But the *circumstances* under which this limitation is applied under the statute is by no means, as at the civil law, or as in the Novel; there it is a universal limitation. In the statute it is *only* where they come in as next of kindred, and *one moiety of the estate has been distributed to the widow*.

In that case, in favor of the surviving brother or sister, or nephew or niece, they are to succeed to the whole of the other moiety, one-half of the estate having been absorbed by the widow. The statute says, section thirteen, that when there is a widow who takes one-half the fund, the living brother or his children shall have the benefit of survivorship, as against great nephews and great nieces; and the statute expressly declares, that when there is *no* widow, the estate goes to the children, "then to the next of kindred, and their legal representatives." So a brother or nephew does not have the benefit of survivorship, except where half of the estate goes to the widow. *Sec. 14.*

That is the restriction the foregoing general prefix, contained in the twelfth section engrafting representation on the act, is subject to, and is the only limitation of the general rule of representation. In every other case the declaration of the twelfth section as to "representation" is expressly re-affirmed in the thirteenth section, and if the thirteenth section did not re-affirm the doctrine of "representation" asserted in the twelfth section, the general principle of "*expressio unius, exclusio est alterius*" would prevail.

Here I may as well show the error of holding that

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brothers' and sisters' children do not take by representation when the statute says they shall; an error supported by as much authority as that which holds that *under the statute* representation does not exist among collaterals.

Would any one of your Honors question that the statute in effect said that representation *was to be allowed* as to brothers' and sisters' children, by saying it should not in a given case be allowed after them? And yet the treatises and dicta hold that if an intestate had a brother or sister, both having died at his decease, the brother leaving one son, and the sister leaving two daughters, representation does not exist; the son does not take his father's moiety and the daughters their mother's moiety, but that they take per capita each one-third. *Walsh v. Walsh, Prec. in Chan.* 53.

- A has three brothers, one dies leaving three children, another leaves two, and the third, five; they take all alike, each one-tenth, per capita, and not per stirpes; none take by representation.

In *Lloyd v. Tench*, 2 *Ves., sen.*, 215, the intestate left a daughter of a sister and the son of a brother; they did not each take by representation the moiety of his or her respective parent, representation was not allowed; but they took as next of kindred, which made them one degree more remote than if they had taken by representation (the third degree,) and as there was an aunt of the intestate in the same degree they shared the fund, each taking a third. 2 *Wms. on Ex'rs* 1363.

This too, when the statute says in effect that representation *shall* extend to the children of the brother and sister of intestate.

It is clear that this court is not precluded by consistent adjudication from giving the true construction to this statute. That as such constructions as have been given on other parts of it you could not adopt, and after standing one hundred years have been overruled and a construction adopted which in principle covers this case, so the court is at liberty to administer the statute according to its words and meaning.

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A is a brother living and has ten children ; B is a brother dead leaving one child ; the child of B would take one-half with A, his uncle ; A dies, and B's child takes only one-eleventh. It is contrary to the civil law, the Novel of Justinian, and to our statute.

The statute having in the twelfth section asserted the general doctrine of representation, in the thirteenth section applies it in the following cases :

1. When there is a widow and children, it directs the surplus to be distributed, one-third to the widow, and all the residue, by equal portions, to and among the children of such intestate, and such persons as *legally represent such children*, in case any of such children be then dead. The court will observe that the statute nowhere says that "representation" shall extend to children's children, but only to children, and hence these erroneous decisions. Representation is, however, profusely extended lineally ad infinitum, under the phrase "those who legally represent them;" but that phrase extends to cousins as well as to children, and any adjudication that extends representation to grandchildren extends it also to second cousins.

Is there any doubt that the children and *their descendants*, under the term, those who "legally represent them," take ad infinitum? And yet it is true that Toller, Williams, and Griffith, whose dicta have perverted the law for one hundred years, have held that representation did not extend beyond the immediate descendants of children, or beyond children's children. And if you will exclude representation among cousins you must also exclude it among lineal descendants, for the identical provision as to representation is in the statute applied to cousins that is applied to children.

Gaius, Justinian's Novel, are against the dicta, and finally the courts of England have awoke from their slumber. *Law Reports, Eq. series, March, 1872, p. 292 ; In re Ross Trust.*

Sir John Wickens, V. C.: "The question reserved for judgment in this case is one as to the operation of the *Statute*

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of *Distributions*, where the intestate left grandchildren and great grandchildren, but no children.

"*Alexander Ross*, by his will, dated the 17th day of November, 1819, gave one-fifth of his residuary estate to his daughter *Margaret Ross* for life, with remainder to her children; and in default, 'in trust for the person or persons who, under the statute made for the distribution of the estates of intestates, would then be entitled thereto, in case I were then to die possessed thereof and intestate; and to be divided between and among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statute.'

"In June, 1871, there were two subsisting lines of the testator's descendants; the one springing from *Alexander Ross* the younger, and represented by two grandchildren of the testator and one great grandchild, the only child of a deceased grandchild; the other springing from *William Francis Ross*, and represented by two grandchildren of the testator, two great grandchildren springing from his dead grandchild *William*, and four great grandchildren springing from his dead grandchild *Grace*. The question on the petition is as to the shares in which *Alexander Ross'* estate is to be distributed among those persons.

"It is singular that a question of this sort should be uncovered by judicial authority; but no case bearing on it was cited at the bar, and I have been unable to find any.

"The *Statute of Distributions* deals separately with the case of descendants, and that of next of kin not descendants. The case of children is provided for by the fifth section (which is referred to in the third,) and the case of next of kin, not being descendants, by the sixth and seventh sections. The general effect of the provisions is, that (supposing there to be no wife) the estate, in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next of kin or their representatives; and that the division is per capita where all the takers claim in their own right, and per

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stirpes where they, or some of them, claim as representatives of another person.

"It has been long settled that the word 'representatives' in this act includes only 'descendants.'

"It has been further settled that where all the persons entitled to claim are collaterals equally near of kin, for instance, second cousins twice removed, they take per capita, because they all take in their own right; but that where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution; so that the distribution is per stirpes."

And here the court puts forth a mere dictum as to representation among collaterals, which he might wisely have omitted while washing away dicta as to representation among lineals, which have more color of right in the statute. But it is mere dictum and not authority.

"This privilege is expressly limited by the statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next of kin are all more remote than brothers and sisters.

"There are, therefore, two cases provided for by the statute, viz.: 1, where there are children, or the representatives—i. e., the descendants—of children; 2, where there are no descendants.

"It is the former case alone that has to be dealt with here. Considering the question as one solely on the construction of the statute, it is difficult, I think, to resist the conclusion that, if there are *descendants*, but no children living to share the estate, it is to be divided *into as many shares as there are children* who have left living descendants, and that the descendants of each such child are to take as representing the child, and of course, only the child's share.

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"Feeling, therefore, free to follow my own clear opinion on the construction of the statute, I hold that in this case the sum in question must be divided into moieties, of which one is divisible among the descendants of *Alexander Ross* the younger, and the other among the descendants of *William Francis Ross*; the division among each class being in each case per stirpes."

It is idle to talk about this court being bound by dicta, after the courts of England have disregarded them. I shall show the court we are much more free than they. The dicta have undoubtedly been based on the *words* of the 13th section: that the distribution is to be to children and *their* legal representatives, in the first item of the 13th section.

In deciding the case cited, the court has given construction to the last item of that section which provides, in the case of no widow, that distribution is "to be to and among the children, and in case there be no child, then to the next of kindred, and their legal representatives."

The very term "equal portions," as connected with children's children, proves representation, for how could the "portion" be equal when there was one son and two children of another deceased son, unless the two grandchildren took per stirpes, by representation, a moiety with the son's moiety, and so on.

2. In case there be no children "nor any legal representative of them," then one moiety to the widow and the residue to every of the next of kindred who are in equal degree, and "*those who represent them*;" provided that no representation shall be admitted among collaterals of the brothers' and sisters' children. A very wise provision! As all collaterals are in the distribution excluded in favor of children and childrens' children ad infinitum, so where half the fund is taken by the widow it is proper that remote collaterals should be excluded in favor of brothers and sisters and their children.

3. In case there be no widow, then all is to go to the children; and if no child, then to the next of kindred in equal degree and "their legal representatives."

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The term "legal representatives" of next of kindred means here what it does when used three times before in the same section; twice as to legal representatives of children, once as to legal representatives of next of kindred; it means the children of next of kindred.

4. If no wife nor children, (14th section) but a mother with brother and sisters, "the representatives of them shall have an equal share with her, *anything in this act or any law to the contrary notwithstanding*; and here we have an instance at once, when, in case there is no widow to take half of the estate, "representation" without any limit is expressly assured to brothers and sisters.

III. The only question that remains to be considered in the construction of the statute, is whether the term "next of kindred and their legal representatives as *aforsaid*," can mean anything other than the descendants of that class who are the next of kin, to wit, in this case the descendants of first cousins who have left children. If it does mean that, of course the second cousins in this case represent their parents.

1. It says "next of kindred and their legal representatives as *aforsaid*." Three times in the section that phrase has been used, in a way that it can mean nothing other than the children of those who would take if living, and here it means the same, and strengthens itself by appropriating the clear meaning of the other phrases by saying legal representatives "*as aforsaid*." In one of the cases, to wit, the provision as to lineal descendants where it says "those who legally represent such children," we have the adjudication in favor of representation ad infinitum despite the absurd "*dicta*" that representation only extends as far as "children." *Ross' Trust, L. Rep., March, 1872*. What representation means among children, it means among "next of kindred."

2. That "descendants" is the received meaning of the term "those who legally represent them," whenever it occurs in the statute, see *same case*, p. 293. "It has long been settled

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that the word 'representatives' in this act includes *only* descendants."

3. It is clear the term does not mean executors or administrators, but children or other descendants; *because* executors and administrators cannot take as such in any case. If *their* testator or intestate be not in being to take when the time for taking happens, when the distributive share vests, there is no distributive share in existence for them, but children stand in their parents' place, "*jure representationis*."

4. The phrase must mean descendants, because in the statute the fund is given to children, and if they be dead *to their legal representatives*; and if there be any representatives of children, a *third* goes to the widow *instead of a moiety*, and none to brothers and sisters. Those words meaning "descendants," and only by so meaning, withhold the fund from those who otherwise would take it.

5. The whole purpose of the statute of distributions is to designate *the persons* who are to take, and when one individual cannot take, his representatives are designated; it must refer to *his* children, because if *they* are not meant others take under primary designation of their own and not by representation, and so the phrase would have *no* meaning. Thus, if "children and their legal representatives" does not mean "children and their children," collaterals would come in before children's children.

The phrase does not mean second cousins when all the first cousins are dead, for they take *not* as representatives in that case, but directly from intestate.

If then by "representatives" are meant "children and descendants," the last item of section 13th, which covers the case in hand, is plain, and *clearly provides for calling in the children of deceased cousins to take distributive share with cousins*, and this without any qualification whatever. Any dicta to the contrary are not worth minding against the clear words of the law. The late case of Ross' trust shows that "dicta" in such cases are not worth a rush, and under the

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authority of that case "representation" cannot be extended to children without extending it to cousins.

The language of that part of the statute with which we have to do, is "the next of kindred in equal degree and their legal representatives."

Before considering what that means, let me call attention to what the phrase "in equal degree" means. It may be said that first cousins and second cousins are not in equal degree. That is true as to second cousins, who are the children of *living* first cousins, but when the first cousin is dead, leaving children, if representation is allowed they take their parents' place, and are in equal degree. *Fidler v. Higgins*, 6 C. E. Green 151.

It is a common law phrase introduced into the statute. This phrase "equal degree" thus explained, what does "next of kindred and their legal representatives" mean?

The statute might have said "the next of kindred" and there stopped; that is what our opponents say it means as it stands. That was the case in our statute of 1676, as we shall presently see, and the phrase "and their legal representatives" was added for the very purpose of giving "representation among next of kindred." For what other purpose are those words added?

What do the words "in equal degree and their legal representatives" mean, other than "the nearest living relative, including all who are dead of their class by their legal representatives." This is what "in equal degree and their legal representatives" means, and all the general impressions and dicta in the world cannot change it.

Let me read the statute, substituting first cousins for "next of kindred." "If no widow and no children, distribution shall be made to the first cousins in 'equal degree and their lawful children' representing them." Is there any doubt about it? It does not say to first cousins *if living*, it says the contrary by saying in effect, *if dead*, to their children.

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But the construction of this statute is plainer here than in England.

The statute of Charles II. was enacted in England in 1671, and we had a statute of distribution adopted in 1676. The date of the statute is found in *Leaming and Spicer*, p. 409, *provision* 403, directing the administrator to secure two parts of the estate to the children, and one part to the wife; and if there be no child, then one-half to the next of kindred, and the other to the wife. Re-enacted November 21st, 1681. *L. & S.* 430.

And when we adopted this statute in 1794, (*Pennington's Laws*,) we adopted it as amplifying the old statute, adding to the words "next of kindred" the words "and their legal representatives." We did not adopt any of the principles of the twelve tables of Rome, which among other things provide that the father shall have the right over the life of his children. And when in 1794 we engrafted on our statute of distribution the doctrine of representation among next of kin, we also then introduced the *one restriction*, that when there is a widow who takes half of the fund the brothers and sisters of the intestate and their children are to be favored as against more distant kindred.

This statute of Charles II. is introduced here only as if Walter Walker had sent a copy of it in a letter. It is to be construed in harmony with our institutions and laws. That harmony requires that when one dies intestate, leaving a first cousin, and the children of another first cousin, the first cousin living shall not by survivorship wrest to himself from the children of the other the distributive share that would have belonged to their father, because we have abolished survivorship unless it is expressly stated that the estate is a joint tenancy and not in common.

It is not in accordance with justice that one who would have had, say the half of the estate if his brother had lived, shall have the whole by depriving his brother's children of it in the event of his brother's dying.

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It is in accordance with our law that an estate shall be generally divided and not go to a favored few. Males are no better than females; we have altered the common law in that. The oldest son is no more favored than the youngest daughter; we have altered the law in that respect. We will not suffer estates by will or deed to be so tied up that a privileged few shall enjoy them; we have abolished entails; and the abolition of primogeniture and entails have done as much to make us a free and prosperous people as the fundamental political doctrines of our land.

This statute should be construed according to its meaning and words, and *will be*, disregarding the Novels of Justinian, and the twelve tables, and the absurd and overruled dicta of authors and judges.

Again. There is a statute which I may say is in *pari materia* with this. It relates to the distribution and descent of the estates of intestates; it only differs from the statute in question, in that this relates to personal and that to real estate. Statutes are in *pari materia* when they relate to the *same person or thing*. *Smith's Com.*, p. 751. Here the person is the same, and the thing is his estate. English laws concerning paupers and their Bankrupt Acts are held to be in *pari materia*. The whole system of legislation upon a subject may be taken in consideration in order to aid in the construction of a statute.

When one seized of real estate dies intestate, without issue, brother or sister or their issue, or father or mother, and shall leave several persons "all of equal degree of consanguinity, to the person seized," the lands, &c., shall go to the said several persons *in equal degree* of consanguinity to the person seized, *in equal parts*, however remote from the person seized the common degree of consanguinity may be." *Elmer's Dig.* 131, 132.

Land is to go to the persons of equal degree of consanguinity. Now the general impression was, that second cousins

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would not inherit with first cousins, because not in *equal degree*, because they could not take in equal parts; and in this statute there is *no provision for representation* as there is in the statute we are considering. But as in the case of personal estate the statute expressly provides, as we have seen, for "representation," so as to real estate the common law is held to provide for representation which the statute omits; that being supplied the second cousins represent parents, and are in equal degree, and as they take the parents' share, they take in equal portions. *Fidler v. Higgins*, 6 C. E. Green pp. 140, 145, 146, 147.

This decision was obliged to overrule impressions entitled to much respect.

This case settles the law, not only as to estates of intestates, but will give construction to many wills, as when a testator makes a bequest to some institution, and residue to my nearest kindred and their legal representatives.

Mr. C. Parker, (with whom was Mr. Van Fleet and Mr. A. Wurts,) for respondents.

1. If the question were new, the estate of the intestate goes, by the words of the statute, equally among his next of kin, excluding, in the case of collaterals, all representation by parties less related to him than are the children of his brothers and sisters.

2. But the question is not new. This construction is two hundred years old, and unvarying. And history shows that to have been the meaning of those who drew this statute. 4 *Burns' Ecc. Law* 356; *Roberts on Succession* 31-32; *Sir T. Raymond* 506.

3. At all events, this construction being repeatedly established and acquiesced in, was adopted into the law of this state, and can only be changed now by the legislature. 2 *Bl. Com.* 515; 4 *Griffith's Law Reg.* 1257; *Fidler v. Higgins*, 6 C. E. Green 160.

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4. To say that English Chancery has overruled old text books and dicta as to this statute in another point, proves nothing. Especially as the case cited affirms our construction of this point, and we stand not on text books, but numerous adjudications.

To say that the proviso only refers to that part of the statute which precedes it, is incorrect. The last clause, by saying the estate, in case there be no widow or child, shall go to the next of kin and their representatives "as aforesaid, and in no other manner whatsoever," repeats the proviso. Yet this repetition was unnecessary. Could the legislature have intended a different rule when there was neither widow nor children, than that established when there was a widow? A different rule with all the personalty than with half?

To say that this is the first case in reference to cousins, seems illogical when so many cases adjudicate the same principle now invoked.

To say that representation is forbidden as to nearer relatives and allowed as to those so far off as second cousins, approaches the absurd. The statute aims at excluding distant collaterals, because their number is likely to fritter away estates by distribution among people probably unknown. The argument made stultifies the legislature.

The only other meaning possible to the restrictive words is, that there shall be no representation after children of brothers and sisters, of collateral kindred. Certainly there is some restriction. Does the case show that these claimants are such children? It only states them to be children of deceased cousins. Whether their parents were brothers or sisters of the cousins who claim, does not appear.

In no event, then, can they succeed.

The opinion of the court was delivered by
BEDLE, J.

This appeal is from the decree of the Ordinary, dismissing an appeal from a decree of distribution of the Orphans Court

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of the county of Somerset. The intestate, Dr. Henry Vanderver, was never married. His nearest relatives at his death were five cousins, to whom his whole personal estate was ordered distributed. The appellants are his second and third cousins, and they claim a share in the distribution as representatives or descendants of other cousins deceased in the lifetime of the intestate. The question for decision is whether, under our statute of distributions, (*Nix. Dig.* 305, §§ 12, 13,) the five cousins take the whole personal estate, to the exclusion of the children and grandchildren of the other cousins deceased—or, in another shape, whether collateral relatives can take by representation, except in the case of the children of a deceased brother or sister of the intestate. Our act was passed in 1795, and is in all material respects, (so far as it affects the question before us,) a transcript of the act of 22 and 23 *Car. II.*, *cap.* 10, the analogous proviso in which latter act is in these words: "That there be no representation admitted among collaterals after brothers' and sisters' children." It has been well settled by the courts in England, for over a century and a half, and always acted upon, so far as anything to the contrary appears, since the passage of the act, that the effect of this proviso is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin, *per capita*, except in the one case of the children of deceased brothers and sisters of the intestate, among whom alone, of the collaterals, the right to take, *per stirpes*, by way of representation, may exist. *Carter v. Crawley*, *Sir T. Raym.* 496; *Maw v. Harding*, 2 *Vern.* 233; *Pett v. Pett*, 1 *P. Wms.* 25; *S. C.*, 1 *Salk.* 250, and 1 *Ld. Raym.* 571; *Blackbrough v. Davis*, 1 *P. Wms.* 41; *Bowers v. Littlewood*, 1 *P. Wms.* 594; *Caldicot v. Smith*, 2 *Show.* 286; *Woodroff v. Wickworth*, *Prec. in Chan.* 527; *Walsh v. Walsh*, *Prec. in Chan.* 54; *Durant v. Prestwood*, 1 *Atk.* 454; *Stanley v. Stanley*, 1 *Atk.* 455; 2 *Vesey, sen.*, 213; *Toller on Ex'rs* 383; 2 *Wms. on Ex'rs* 1298; 2 *Black. Com.* 515; *Bac. Ab., Ex'rs and Adm'rs I.*; 2 *Kent's Com.* 425; 4 *Burns' Ecc. Law* 358; *L. R. 13 Eq. Cases* 286, *Ross' Trust*.

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This construction of the English statute was well understood when our act was adopted, and since then it has been recognized in our treatises in common use, and been approved of by the learned of the bar. *Griffith's Treatise* 292; *N. J. Justice* 99; 4 *Griffith's Reg.* 1257.

Besides, we have no doubt that the Orphans Courts of the state have followed that construction. The same, we think, is also justified by the natural reading of the statute. It was intended in section thirteen that, whenever the estate in whole, or in part, (whether a widow or not,) goes to collaterals, the right to take by representation, among them, should be limited to the children of the intestate's brothers and sisters.

Under this view, the appeal of the Ordinary was properly dismissed, and his decree should be affirmed, with costs, to be paid by the appellants.

The whole court concurred.

MERCHANTS' NATIONAL BANK OF NEWTON, appellants,
and NORTHROP and NORTHROP, respondents.

Appeal from decree of the Chancellor. The opinion is reported in 7 *C. E. Green* 59.

Mr. Coult and *Mr. Pitney*, for appellants.

Mr. Linn, for respondents.

BEDLE, J.

The question on this appeal is purely of fact—Whether the deed sought to be set aside was in fraud of creditors?

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The transaction is very suspicious, but the evidence fails to sufficiently satisfy us that it was fraudulent. The decree of the Chancellor must therefore be affirmed, with costs.

For affirmance—BEASLEY, C. J., BEDLE, CLEMENT, DAL-
RIMPLE, DEPUE, DODD, OGDEN, SCUDDER, VAN SYCKEL,
WOODHULL. · 10.

For reversal—NONE.



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ABANDONMENT.

1. If a husband who has ample means takes his wife, with whom he has for years been living in a city in discord and bitter contest, to a retired country tavern, against her wishes and protest, and, in her absence, leaves the place, with all his baggage, without notice to or knowledge by her of the place to which he has gone, and without any notice by him to her whether he has made provision there or elsewhere for her support, and leaves her thus without money and without any one in the house or its vicinity, for companions, except the tavern-keeper and his wife, it is such abandonment and separation as, if without justifiable cause, will entitle her to a decree for support and maintenance. *Boyce v. Boyce*, 337

2. A wife is bound to accompany her husband to such place as he may, as head of the family, in good faith determine to remove to for habitation or business, provided it does not unreasonably banish her from all society and comforts of civilized life. But a husband has no right, as a punishment for contumacy or bad temper, to banish his wife to a lonely place, without friends or society or her accustomed comforts, when he does not stay with her and share her privations. *Ib.*

3. By law, a man is not justified in deserting his wife because she is extravagant or lazy, or swears, or uses coarse language, or is sickly, fretful or of violent temper, or because she wreaks her temper or showers her coarse or profane language upon him, and thus makes his life uncomfortable. These are not crimes, but infirmi-

ties and defects, which, in consideration of law, a husband undertakes to put up with when he takes his wife for better or for worse. *Ib.*

ACCEPTANCE.

See CONTRACT, 9, 10.

ACQUIESCENCE.

1. Where a party purchases land at its full, fair value, and, supposing it to be free from encumbrance, erects buildings of considerable value, and judgment creditors of the former owner of the land, with knowledge that these buildings were being erected, and having reason to believe that it was done under a mistake, by their silence and acquiescence fraudulently encourage him to go on and erect his buildings, and then issue an execution, the sale of the buildings will be restrained. *Dellett v. Kemble*, 58
2. If enough of the buildings had been erected, without the knowledge of the defendants, to satisfy their judgment, by adding to their value the price of the lot, the defendant should be allowed to sell. This does not sufficiently appear by the answer; and therefore injunction continued to the hearing. *Ib.*

ADMINISTRATION DE BONIS NON.

When an executor who has so far administered the personal estate of his testator as to convert it into money, dies, and administration *de bonis non* is granted, the

administrator is not entitled to demand of the executor of such deceased executor the part of the estate converted into money; for that, the representative of the deceased executor must account to the legatee or next of kin. He is only entitled to such chattels or choses in action as have not been so converted, and exist as they were at the death of the first testator. *Currick's Adm'r v. Currick's Ex'r*, 364

ADMINISTRATOR.

An administrator of an intestate who owned the equity of redemption in lands sold under a decree for foreclosure, who is decreed to be entitled to the surplus after satisfying the mortgage, for the payment of the intestate's debts, must execute a bond, with sufficient sureties and with condition as required by the statute in the case of lands sold by the order of the Orphans Court. *Insurance Association v. Jones*, 171

See ADMINISTRATION DE BONIS NON.
PURCHASER, 2.
SEALED INSTRUMENT.

ADMINISTRATOR'S BOND.

No relief can be had, even in equity, by the next of kin, against the sureties on an administrator's bond. *Dorsheimer v. Rorback*, 46

ADMISSIONS.

See EVIDENCE, 3.

ADVANCEMENT.

1. An advancement in money, made by a father in his lifetime to one of his sons, cannot have any effect upon the share of the real estate of the father, which, at his death descends to the son. Only advancements or settlements in land can have such effect. *Havens v. Thomson*, 321

2. Whether an agreement by parol, or in writing without seal, by a son with his father, on receiving an advancement in money, that it shall be in full of the son's share of the father's real estate at his death, can have any effect. *Quare*. *Ib.*

See RESULTING TRUST, 3.

AGREEMENT.

See CONTRACT.

AMENDMENT.

1. An agreement between solicitors to amend the bill so as to conform to the facts, there being no amendment actually made, cannot avail on the hearing for final decree. Neither an agreement to amend, nor an order giving leave to amend, amounts to an amendment, even if filed. *Wilson v. King*, 150

2. Bill may be amended according to the fact, after hearing, on application before decree for that purpose. *Hampton v. Nicholson*, 423

See ANSWER.

ANSWER.

1. An amendment will not be permitted to an answer after it has been sworn to and filed, except to correct a verbal or clerical mistake, or to amend or supply a formal defect. A supplemental answer must be filed, and this will be permitted even after replication, and the complainant has commenced taking evidence. *Burgin v. Giberson*, 403

2. But leave will be granted to amend an answer only in cases where it clearly appears that the matter to which the amendment relates is material to the defence, and that the amendment is necessary to enable the defendant to bring the merits of his defence before the court. *Ib.*

3. Leave will be granted to file a supplemental answer for the purpose of stating a matter which the defendant had been told by counsel would constitute no defence, and which he did not, therefore, mention to his solicitor, who prepared the answer in ignorance of the existence of such defence. But it will be granted only on such terms as will do the complainant no injury, or create no serious delay. *Ib.*
5. An assignment by the husband and wife of her reversionary choses in action, passes an interest therein *sub modo*, to become effectual only in the event of the husband and wife living long enough to enable the assignee to reduce the chose in action into possession. *Ib.*

See EVIDENCE, 1, 2.

APPEAL.

See COSTS, 4.

ISSUE, 3.

ASSIGNEE AND ASSIGNOR.

See MORTGAGE, 7—9, 14, 16, 17.

ASSIGNMENT.

1. The evidence in this case held not sufficient to show fraud and avoid certain assignments charged to be without consideration, and fraudulent and void as against the complainant. *Jones v. Adams*, 113
2. But one of the mortgages assigned being for a greater amount than was given for it by the assignee, and the circumstances being suspicious as to the fairness of the transaction, the assignee was decreed to assign it to the complainant on his paying the amount of the securities given in exchange for it. *Ib.*
3. An assignment executed by the husband and wife, of a policy of insurance on the life of the husband in favor of the wife, and given as collateral security for the husband's indebtedness then existing, is a valid assignment. *De Ronge v. Elliott*, 486
4. Knowledge by the wife that her husband was in great difficulty, arising out of his indebtedness and of the pendency of suits against him, it appearing that the motive to the execution of the assignment by her was the benefit to her husband by the security thus afforded to his creditor, will not invalidate the assignment on the ground of duress. *Ib.*
6. Such assignment having no effect against the wife's right by survivorship unless the chose in action is reduced into possession, it will be void when the fund cannot fall into possession during his life, as where it is expressly limited to the wife in the event of surviving him. *Ib.*
7. The reversionary interest secured to the wife by a policy of insurance on the life of her husband, is her sole and separate property, under the fourth section of the Insurance Company's charter, and the act for the better securing the property of married women. And she has, therefore, the policy being an obligation to pay money to the wife after her husband's death, the power to assign it. Nor is it material that her interest is contingent on her surviving her husband. In that case the assignee would take it; otherwise, the children living at the husband's death. *Ib.*
8. That the fund created by a policy of insurance on the life of a husband, for the benefit of the wife, was created for the particular purpose of providing for the widow and family of the insured at his death, does not invalidate an assignment of such policy, made to secure the husband's indebtedness. The general act in respect to such policies did not intend to restrict

- them to that particular purpose, and expressly exempts them from the claims of the husband's creditors, only when the annual premium does not exceed \$100. *Ib.*
9. By the law of New Jersey, a life insurance policy was not prohibited as a wager policy, or condemned by general principles of expediency and morality. Before the statutory enactments with regard to such policies, they were held to be not contracts to indemnify against loss, but to pay a given sum upon the happening of a given event. *Ib.*
- See MORTGAGE, 7-14.
- ### AWARD.
1. If arbitrators refer any point to judicial inquiry, by spreading it on the face of the award, and they mistake the law in a palpable and material point, their award will be set aside. But, in general, being the chosen judges of the parties, they are judges of the law as well as of the facts, and are not bound to award on mere dry principles of law, but may do so according to the principles of equity and good conscience. *Ruckman v. Ransom*, 118
2. Courts will not compel arbitrators to disclose the grounds of their judgment, nor disturb their decisions when made, except upon very cogent reasons. *Ib.*
3. An award can not be reviewed and corrected, or set aside, at law or in equity, because it is erroneous, or because it is plainly excessive, unless the excess is clearly demonstrated, and is so great that it is not possible to account for it except by corruption or dishonesty in the arbitrators. It will not be set aside, as a verdict at law or a master's report in equity, because clearly erroneous and against the weight of evidence. *West Jersey Railroad Co. v. Thomas*, 431
4. Evidence as to the cost of operating most railroads, in the absence of any proof to show the rates of fare per mile on those roads, is no guide to ascertain the net profits of a particular road. *Ib.*
5. The true method of calculating the value of an unexpired lease is by annuity tables; by multiplying the clear annual value of the lease by the value of one dollar per annum for the unexpired term, at the rate of lawful interest. *Ib.*
6. An agreement between parties to an award, in the presence of the arbitrators, at the close of the evidence, that the case should be submitted to the arbitrators upon written arguments of counsel, upon a specified copy of the evidence and the exhibits in evidence, and that the award was to be made without any further intercourse with either party, and that if the two arbitrators were unable to agree, the case should be submitted to the third arbitrator chosen, upon the same arguments and proofs, without the intervention of the parties, is legal and valid. But such agreement is not proved here; and if it was, it will not justify an award made by a third arbitrator without reading the arguments of counsel, on which it was agreed to be submitted without further notice to the parties. *Ib.*
7. When a new arbitrator is chosen by the original arbitrators, either party has the right to adduce additional testimony and additional arguments. *Ib.*
8. Whether an award was ready to be delivered in time, or whether being ready to be delivered out of the state is a compliance with the condition of the submission, are questions of law to be disposed of by the court in which the suit is brought on the award. *Ib.*
9. A court of equity will not set aside an award because not delivered in time, when the delivery was re-

strained by injunction at the suit of the party making the objection.

Ib.

10. Where, after an award was determined upon and reduced to writing, an injunction was served upon the arbitrators against signing and delivering it, there was no impropriety in their signing it in accordance with advice of counsel for the party in whose favor the award was made.

Ib.

BILL TO REDEEM.

See COSTS, 3.

BILL OF REVIVOR.

Bill to revive a suit in equity, founded on a judgment obtained more than twenty years before the bill was exhibited: the judgment will be presumed to be paid and the bill of revivor dismissed. *Bird's Adm'r v. Inslee's Ex'rs*, 363.

BONA FIDE PURCHASER.

See PARTNERSHIP, 12.
PURCHASER, 3.

BURDEN OF PROOF.

1. When the controversy is as to the fact whether a deed was intended as security only, the burden of proof is on the grantor, and his oath against that of the grantee is not sufficient to change a deed absolute on its face into a mortgage. *Freytag v. Hoeland*, 36.
2. But where the mortgagee admits that he required an absolute deed as security for a debt, without any recital to show what the debt was, and the mortgagor testifies that the consideration expressed in the deed was the debt it was intended to secure, the burden of proof is on the mortgagee to show that it was given as security for a greater amount.

Ib.

BY-LAW.

See SUBROGATION.

CANCELLATION.

Where a mortgage is canceled by mistake, or the canceling is procured by fraud, a court of equity will set aside and disregard the canceling so made or procured, and give relief upon the mortgage as if not cancelled. *Dubois v. Schaffer*, 401.

See MORTGAGE, 25, 28.

COMMISSIONS.

See MASTERS' REPORT, 10.
TRUSTEE, 6—9, 11, 13.

CONTRACT.

1. The pastoral relation is for religious and not mercenary ends, but the contract involved in it imposes pecuniary obligations and gives pecuniary rights which the law enforces and protects, and the surrender of those rights, when it involves matter of pecuniary loss, is lawful matter of pecuniary compensation, and is a valid consideration for a contract to pay money. *Worrell v. Presbyterian Church*, 96.
2. Where six of seven associates in a purchase of land on speculation, each agreed to take a specified number of the twelve and a half shares in which the scheme was divided, at a fixed price per share, and also agreed to take the shares in the scheme that might remain unsold, each in proportion to the shares taken by him, at the same price per share, and another associate subscribes for a half share, but refuses to enter into the agreement to take a proportion of unsold shares, the owner of the half share is not entitled, on winding up and settling the scheme, to any part of the unsold shares or of the

- profits on them. *Douglas v. Mercers*, 331
3. And, on the other hand, the shareholders who agreed to purchase them, are bound to pay and account for the full price of those unsold shares and the interest on that price, out of their own funds, and cannot have any part of the profits in the scheme appropriated to pay for those shares before these profits are divided. *Ib.*
4. The defendant offered the complainant that if he would purchase the title of a stranger to a lot lying within his premises, he would pay \$100 towards it. The complainant purchased it for \$375. *Held*, that the defendant was bound to pay \$100, with the interest from the purchase, but could not be compelled to pay more. *Black v. Keiley*, 358
5. The defendant was bound to pay the price agreed for this title, even if proved not to be a good title. *Ib.*
6. A contract made by an executor of a deceased member of a firm, with a firm of which the executor is himself a member, for the sale to them of his testator's real estate, is not one which a court of equity will confirm, if it is opposed or contested by any of the *cestuis que trust*; much less will it decree a specific performance of it. *Colgate's Ex'r v. Colgate*, 372.
7. An agreement by testator's widow, (even if made,) that the firm of which he was a member should take his interest in real estate belonging to the firm, at a valuation made shortly after his death—the widow being entitled, under the will, only to the income of half of the estate during her life, and an infant to the other half absolutely on attaining age, and though appointed guardian by the will, of such child, having no judicial authority to enter into any agreement or bargain with regard to his real estate—would not deprive her and the child of the right to have it sold at the full value it will bring at the time of the sale. *Ib.*
8. An agreement to pay the debts of another must be in writing. Such agreement can be enforced at law, and is no defence or set-off to a suit for the foreclosure of a mortgage debt. *Williams v. Doran*, 385
9. An acceptance, to be good, must be such as to conclude an agreement or contract between the parties; and to do this it must, in every respect, meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. *Potts v. Whitehead*, 512
10. On a bill for specific performance, the alleged agreement consisted of an offer to sell land on certain specified terms, and the following letter: "Have twice attempted the tender of the first payment of \$500 upon the agreement made between us on the 7th of December last. I will meet you, &c., when I shall be ready to make tender of the money, and execute the proper agreements thereupon." *Held*, that this letter was not, either in terms or substantially, an acceptance of the offer, and concluded no contract between the parties. *Ib.*

See LOTTERY.

MARRIAGE.

MECHANICS' LIEN, 4

CORPORATION.

1. When a charter directs that all elections of directors after the first shall be held annually, at such time as the by-laws shall direct, no second election can be held until by-laws designating the time have been adopted. Nor can there be an omission to hold an election, such as to authorize the directors to designate a day for it

- provided for only in case of such omission. *Johnston v. Jones*, 216
2. Acts required to be done by the directors of a company, as the designating a time for election, must be done by them as a board when lawfully convened. *Ib.*
3. A determination by the board or a majority of directors that an election must be held, without fixing a time, does not authorize one of them to fix the time and give notice for such time. *Ib.*
4. A notice of an election required to be given by the directors, is not a sufficient notice, if signed by the individual names of a majority, without stating that it was given by order of the board, or stating that the persons whose names were signed were directors. *Ib.*
5. An election is not legal, if the list of stockholders exhibited and acted upon on the day of election is not a true list of the stockholders, and known not to be such by the parties who exhibit it and who vote upon it. *Ib.*
6. Stockholders who are not such at the day an election is held, cannot vote, although they were stockholders at the day on which it should have been held. *Ib.*
7. A majority of a board of directors, who have been legally elected, and are in fact in possession of their offices, and in whose place no directors have been legally elected, have the right to use the name of the corporation in a suit. *Ib.*
- See DEED, 1.
- COSTS.
1. Costs of the trustees, who have properly asked the direction of the court, and the surviving children who have answered, must be paid out of the trust fund; the daughter's child must pay her own costs. *Slack v. Bird*, 238
2. Motion to dissolve denied, with costs; the costs of the motion for receiver to abide the event. *Sutro v. Wagner*, 388
3. On a bill to redeem, the general rule is that the mortgagor must bear the costs; but the mortgagee, by his misconduct, may forfeit his immunity, and be condemned to pay them. *Lozear v. Shields*, 509
4. Whether an appeal will lie from a decree on the point of costs.—*Quare.* *Ib.*
- See TRUSTEE, 20.
- COVENANT.
1. A parol agreement by the grantee, at the time of taking a deed, that he would assume a mortgage upon the property as part of the consideration, will be enforced in equity. A covenant in the deed that the premises are free from encumbrances, or any other covenant, will not estop the assignee of such mortgage from recovering on such undertaking. *Wilson v. King*, 150
2. The usual covenants in a deed are not part of the conveyance of real estate. They are mere personal covenants. A covenant against encumbrances, therefore, by a married woman, resident in the state of New York, in a conveyance of her husband's property, situated in this state, the law of New York not authorizing a married woman to enter into covenants as to her husband's property, does not affect, nor does any estoppel arising therefrom affect, a mortgage upon the property given by the husband prior to the conveyance, and which, after the conveyance, was assigned to the wife, and by her assigned to another. Her assignee would be entitled to a decree but for the defect in the pleading. *Ib.*

CREDITOR.

See MORTGAGE, 1.

DECREE.

1. The proof in this case is sufficient to warrant a decree for deficiency in proceeds of sale against the grantee. But the allegation of the bill being that the undertaking was a stipulation contained in the deed, and that the grantee became bound by the acceptance of the deed, while the proof is that it was not contained in the deed, and was a parol promise at the making of the deed, the variance is fatal to such a decree. *Wilson v. King*, 150
2. To entitle a complainant to a decree in a foreclosure suit for any deficiency of the proceeds of sale in discharging the mortgage, the party sought to be charged must have been served with notice that decree would be asked for against him. *Ib.*
3. No positive relief, in adjusting equities between defendants, can be decreed or granted to one defendant against another, except such as can be granted incidentally to the relief sought by the complainant. *Mount v. Potts*, 188
4. No decree can be made against a wife to execute a deed. *Pinner v. Sharp*, 274

DEDICATION.

1. If a purchaser of a tract of land subject to a mortgage given by him for the consideration money, lays out the same in blocks and streets, and sells lots by reference to the map by which it is laid out, and thus dedicates these streets to public use, as against himself, upon a foreclosure sale made under the mortgage, in a suit where such purchaser is a party, the dedication is made void. The purchaser buys free from it. *Hague v. West Hoboken*, 354
2. If, after the streets have been opened and used by the public, the mortgagee releases to the mortgagor a block, with its appurtenances, referring to the map, one who had purchased a lot in said block and on such street, and by such purchase had acquired the title of the mortgagor to the middle of the street, or a right of way over it, this release discharges not only the lot, but the half of the street or the right of way to which the purchaser acquired title, from the lien of the mortgage, and the subsequent foreclosure sale does not affect the title to such street or right of way. *Ib.*
3. The rights that others have acquired, by dedication, from the mortgagor over this street or right of way so released, are not affected by the mortgage sale if not made parties to it. *Ib.*
4. The purchaser of such lot, with the right of way appurtenant, will not, as against the public, be allowed to enclose the land in front of his lot so dedicated, by virtue of a deed given to him by the purchaser at the foreclosure sale for that purpose. *Ib.*
5. By deed, H. dedicated certain lands for the purposes of a private pleasure ground, in trust, that the trustees should "forever thereafter suffer and permit Llewellyn Park and its appurtenances, with its several roads or avenues, and ways or rights of way, as laid down on the said map, to be fully and at all times used and enjoyed as a place of resort and recreation, by the several persons," &c. The deed provided that certain managers should have the exclusive control of the park for the prescribing and enforcement of rules and regulations for the use and enjoyment thereof. Purchasers of certain lots outside of the park, belonging to H., were to be permitted to use and enjoy said park, and said roads or avenues, and ways or rights of way, for the like

purposes, and upon the same terms, &c. H. conveyed a lot to W., with this clause: "Also as an easement appurtenant thereto, the right to use, frequent and enjoy a certain private pleasure ground in the vicinity thereof known as Llewellyn Park, for the purposes, and upon the terms, charges, restrictions, and regulations set forth in the deed of conveyance, &c., for the said park, made by said H. to said trustees." W. therein covenanted that he, his heirs or assigns, would not erect or permit upon the premises any hotel, slaughterhouse, steam engine, &c., or any other place or building for the accommodation of any other trade or business, dangerous or offensive to the neighboring inhabitants. Upon bill for injunction by H. and others, *held*—

1. That the blasting or breaking stone by W. on his lot as a business for profit or for sale of the stone, was a violation of his covenant, and must be enjoined; also, the use of the avenues of the park for carting away the stone from his lot for the purpose of selling them. 2. The removal of loose stone or rock on the lot, that do not require breaking, or grading the surface of the lot so much as is necessary to prepare it for building, are not violations of the covenant, and will not be enjoined. Nor will the sale of the stone carried off in good faith for that purpose be restrained. 3. The power given to the managers of the park, to prescribe and enforce rules and regulations for the enjoyment of it, is sufficient to protect those entitled to the enjoyment of it and its avenues, from injury by those claiming the right to use the avenues for carting building materials, or carrying surplus earth and stone away from the lots. *Haskell v. Wright*, 389

6. When the deed under which a purchaser holds title grants him the use of the avenues or roads in a private pleasure ground dedicated by the vendor to certain uses, subject to the restrictions and regula-

tions contained in the deed of dedication, the purchaser will be restrained to the uses prescribed by the dedication. *Ib.*

DEED.

1. A deed of a corporation, under its corporate seal, and signed by the proper officer, is presumed to have been executed by authority of the corporation. An allegation in the bill to the contrary, supported only by an affidavit of belief that the facts are true, is not sufficient to overcome the presumption. *Manhattan Manuf'g Co. v. Stock Yard Co.*, 161

2. No relief will be given in equity to aid a deed alleged to convey a good legal title, and prior in date and registry to the deed against which protection is asked for. Such deed is a good defence at law. *Black v. Keiley*, 358

3. No relief can be given in favor of a conveyance not proved to exist, and not admitted in the answer. *Ib.*

4. When a conveyance provides a way of access for ordinary purposes to the lot conveyed, no way of necessity will arise, although that way is not sufficient for all purposes. *Haskell v. Wright*, 389

5. An acceptance of a conveyance, with a restricted right of way to the lot conveyed, bars the grantee from claiming a larger way as a necessity. *Ib.*

6. An instrument which legally creates an estoppel to a party undertaking to convey real estate, having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does, in fact, pass an interest and a title from the moment such estate comes to the grantor. *Vreeland v. Blauvelt*, 483

7. The clear and settled law of the state is, that whenever, if at all, the title conferred by the will shall be determined, and the devisee before that time shall have conveyed the lands, the title conferred by the conveyance will, at the same point, and at the same instant, be continued. *Ib.*

See FEME COVERT.
INFANT, 1.
PURCHASER, 4.
WILL, 13.

DEFICIENCY OF PROCEEDS.

See DECREE, 1, 2.

DEMURRER.

1. A general demurrer will not lie, where the demurrant is a proper party, though no relief can be had against him. *Dorsheimer v. Rorback*, 46
2. When the facts stated in the bill show that the claim upon which it is founded is barred by the statute of limitations, or by the equitable presumption of payment in analogy to such statute, advantage of the statute may be taken by demurrer. *Bird's Adm'r v. Inslee's Ex'rs*, 363
3. A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so. Where the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled. *Vail's Ex'rs v. Central Railroad Co.*, 466

See DIVORCE, 2.

DEPOSITIONS.

See PRACTICE, 11, 12.

DESERTION.

1. Where the conduct of the husband is the cause of the wife's leaving her home, and his actions since have been such as to prolong her absence for three years, such absence is not desertion contemplated by the statute, and no divorce can be had. *Cornish v. Cornish*, 208
2. Where the husband has not made the advances or concessions which a just man ought to make to put an end to his wife's desertion, induced, though not justified, by his conduct to her, the desertion, though willful and continued, is not obstinate. *Ib.*

DEVISE.

1. Under a devise to trustees of a house and lot in trust for the use, benefit, and profit of M. C., R. L., and W. S. L., during their natural lives, with a further direction that upon the death of the last survivor of said three persons, the trustees should dispose of said house and lot and divide the proceeds equally among the surviving children of W. S. L., and and R. L., *held*, that the word "surviving" refers to the period of distribution, and not to the time of testator's death. *Slack v. Bird*, 238
2. A child of a deceased daughter of W. S. L., the last survivor of the tenants for life, who survived the testator, but died in the lifetime of W. S. L., is excluded from the gift. *Ib.*
3. Where, under a devise to A, B, and C, and if any of them should die leaving no lawful issue, then to the survivors, A and B conveyed and released the real estate so devised to C, by deed with full covenants, including a general

warranty, C has a good and indefeasible title thereto, and a contract for the purchase of such real estate will be enforced. *Vreeland v. Blaurelt*, 483

4. In such case, if C survived A and B, and died without lawful issue, the issue of A or B, (should any there be,) would not take by virtue of the devise. C's estate is defeasible only by his death without lawful issue, and in the lifetime of either A or B. But at that instant their estate passes by the conveyance. *Ib.*

DIRECTORS.

See CORPORATION, 1—7.

DISTRIBUTION, STATUTE OF.

1. Under the Statute of Distribution of this state (*Nix. Dig.* 305, §§ 12, 13, first cousins will take the personal estate of the intestate, to the exclusion of the children and grandchildren of other first cousins, deceased. Collateral relatives cannot take by representation, except in the case of the children of a deceased brother or sister of the intestate. *Davis v. Vandervecr's Adm'r*, 558
2. The effect of the proviso "that no representation shall be admitted among collaterals after brothers' and sisters' children," is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin, *per capita*, except in the one case of the children of the deceased brothers and sisters of the intestate, among whom alone of the collaterals the right to take *per stirpes*, by way of representation, exists.

DISTRIBUTIVE SHARE.

See JURISDICTION, 1.

DIVORCE.

1. An allegation that since September, 1869, (the bill being filed in November, 1871,) the defendant committed adultery with P. M. G. at a house in Amity street, in the city of New York, sufficiently individuates the offence. The time need not be more specifically alleged. *Goodwin v. Goodwin*, 210
2. The offence being sufficiently specified, the demurrer being general, overruled. *Ib.*

DOWER.

1. A married woman having released her dower by joining in a conveyance made by her husband to B, cannot demand her dower against A, who becomes seized of the lands by a title superior to that of B. Her dower once extinguished cannot be revived. *Frey v. Boylan*, 90
2. The widow's quarantine, or right of possession, under the second section of the act relative to dower (*Nix. Dig.*, 4th ed., 250,) is an incident only to her dower, belonging to that right, and inseparable from it. It is a privilege preceding, but not in any wise preventing or impeding the assignment or disposal of her dower. *Bleecker v. Hennion*, 123
3. This privilege is not an estate within the meaning of the supplement respecting partition, approved March 18th, 1858, and does not make the widow a particular tenant within the meaning of that supplement, which must be construed in connection with the supplement approved February 12th, 1855. *Ib.*
4. Under the facts of this case the premises directed to be sold subject to the widow's dower. *Ib.*
5. An ante-nuptial contract to release or not to claim dower, in consideration of an annuity or a

- provision out of personal property; covenanted to be provided in lieu of it, will not bar the claim of dower if the provision on part of the husband fails. *Insurance Association v. Jones*, 171
6. In such case the widow can elect to rescind the contract and claim her dower, but she cannot have both. And having put in her claim against her husband's estate—who had died insolvent—under the covenant to secure her annuity, and having accepted her *pro rata* share of the estate for it, she is barred from claiming dower. *Ib.*
7. A devise of real estate to trustees to pay the widow the income, will not put her to her election, under the sixteenth section of the dower act. *Colgate's Ex'r v. Colgate*, 372
8. If the provisions of the will are inconsistent with the dower of the wife in the testator's real estate, the provision for her in the will will be held as intended in lieu of dower, and she shall be put to her election. *Ib.*
9. A devise of all the residue of testator's estate to his executors in trust, to sell and dispose of his real estate, and to convert the personal estate into money, and to divide the proceeds of his real and personal estate into two equal parts; to invest one of such parts, and pay the income thereof to his wife during her natural life, and on her death to divide the principal equally among his children then living, and to divide the remaining half into as many equal shares as he should leave children him surviving, and to pay one of such last named shares to each child, &c.—the rents and income of the real estate until the sale having also been directed to be divided in the same shares—is inconsistent with the estate in dower, and the widow must elect. *Ib.*
10. The estate or interest of a widow in lands in which she is entitled to dower, is the right to have one-third set off to her by metes and bounds, to enjoy the same for her natural life. Like all other tenants for life, she is not entitled to commit or suffer waste, and must keep the premises set off to her in repair. *Haulenbeck v. Cronkright*, 407
11. When partition can be made of lands wherein an estate in dower is had, the dowress retains her estate as it was before. If dower has not been assigned, she retains the right to have it assigned. If an assignment has been made, she retains the part set off to her unaffected by the partition. *Ib.*
12. If partition can be and is made, the dowress is not a necessary party to a partition suit in equity. *Ib.*
13. When a sale is made under proceedings in partition, the dowress is entitled by the supplement of 1855 to a just and reasonable satisfaction for her estate. This means full compensation for the loss which she sustains by having her estate taken from her by the decree of the court. The value of her estate must be computed from the use and profits she was entitled to derive from it if not sold. *Ib.*
14. It was not intended by the supplement of 1855 that the interest of one-third of the net proceeds was to be paid the dowress, or a sum in gross computed from the interest of such one-third, as a compensation for the sale of her estate. *Ib.*
15. When one person owns a life estate or an estate for years, and the reversion belongs to another, the owner of the reversion is entitled to all the benefit to accrue from the rise in value of the property before the falling in of the precedent estate. *Ib.*
16. Rules 130 and 131 are the rules of this court in sales of land in partition proceedings, authorized by statute, and as such are, until

changed, the binding law of the court. *Ib.* 4. Every kind of estates tail are regulated by the eleventh section of said act. *Ib.*

DURESS.

See ASSIGNMENT, 4.

EASEMENT.

1. No one can have an easement in his own lands; and if an easement exists, if the owner of the dominant or servient tenement acquire the other, the easement is extinguished. *Denton v. Leddell*, 64
2. But if the owner of a tract of land, of which one part has had the benefit of a drain, water-pipe, or water-course, or other artificial advantage in the nature of an easement through or in the other part, sells or devises either part, an easement is created by implication in or to the other part. And this is the case even if it is the servient part that is sold or devised. But this is confined to continuous and apparent easements. *Ib.*

ELECTION.

See CORPORATION,
DOWER, 6—9.

ESTATE TAIL.

1. Where there is a limitation to the issue of the body, followed by the addition of a limitation to the heirs general of such issue, such addition will not prevent the word "issue" from operating to raise an estate tail. *Zabriskie v. Wood*, 541
2. The tenth section of the act relating to descents does not apply to estates limited in especial tail. *Ib.*
3. The whole practical effect of this clause seems to be to abolish the rule in *Shelly's* case, when an estate is given for life, with a remainder to the heirs general of such donee. *Ib.*
4. A conveyance to a wife of her husband's property, made in pursuance of a family arrangement, after consultation, and with the approbation of the husband's mother, will not be set aside in favor of a judgment confessed by the son to the mother more than seven years after the conveyance, for claims alleged to have been in existence before the conveyance, but which she did not then mention, but allowed the settlement to be concluded and acted on. *Brinkerhoff v. Brinkerhoff*, 477

ESTOPPEL.

1. A party is not estopped by his acts or declarations from showing the truth, unless such acts or declarations were intended to influence the conduct of another, or he had reason to believe that they would influence the conduct of another. *Kuhl v. Mayor of Jersey City*, 84

2. A receipt for taxes on real property, given by a tax collector on receiving a check, does not estop him from showing that the check was unpaid, although a purchaser was induced by such receipt to pay the whole consideration. The collector did not give the receipt, knowing that it would be used for such purpose; nor does the mere giving of a receipt which is only a voucher of payment between the parties, and always liable to be disproved, raise the presumption that it will be used to defraud a purchaser. *Ib.*

3. A recital in a deed of a consideration, and that it was paid, does not estop the grantor from showing that some other or additional consideration was agreed to be paid; but such recital, under seal, in a solemn instrument, cannot be overcome except by clear, strong evidence against it. *Stearns v. Stearns*, 167

4. A conveyance to a wife of her husband's property, made in pursuance of a family arrangement, after consultation, and with the approbation of the husband's mother, will not be set aside in favor of a judgment confessed by the son to the mother more than seven years after the conveyance, for claims alleged to have been in existence before the conveyance, but which she did not then mention, but allowed the settlement to be concluded and acted on. *Brinkerhoff v. Brinkerhoff*, 477

5. A court of equity will not aid one against another who has been misled by the conduct of the former, to his prejudice. *Ib.*

See COVENANT.
DEED, 5—7.
FRAUD, 1.

EVIDENCE.

1. An answer, though responsive on the point in controversy, sworn to before an officer in another state, not authorized by the statutes of this state or the rules of this court to take an oath to an answer, has no weight as evidence; it must be treated as a pleading only. *Freytag v. Hodand*, 36

2. A sworn answer, directly responsive to the charge on which the equity of the bill depends, and of a fact within the personal knowledge of the defendant, must prevail against the uncorroborated testimony of the complainant. *Stearns v. Stearns*, 167

3. The admissions of one partner are evidence against the others, in a suit brought against all for partnership liabilities. *Ruckman v. Decker*, 283

See EXCEPTIONS, 1.
PARTNERSHIP, 1.

EXCEPTIONS.

1. Exceptions to a charge in an account stated by a master, which was founded on a statement presented to the master under the oath of the exceptants, may be allowed, if it appear clearly that such statement, in the sworn statement, was by mistake. But such evidence must be of the clearest and most satisfactory kind. The master was right in making the charge upon such sworn statement, without any other proof by the other party. *Marlatt v. Smith*, 56.

2. Exceptions must be set down for hearing, and placed upon the calendar like the hearing of other causes, and notice thereof must be served fifteen days before the hearing, or the report will be confirmed as a matter of course. *Morris v. Taylor*, 131

3. The order setting down the exceptions for argument must be both entered and served before the expiration of the time in the rule nisi, or the report will be confirmed. Either party may set them down for argument. *Ib.*

4. It must appear from the master's report and the proofs and documents accompanying it, that exceptions which would be valid if true, are founded on fact. *Dunnell v. Henderson*, 174

See MASTER'S REPORT, 1, 3, 4.
PRACTICE, 2, 4.

EXECUTOR.

1. One executor can sell and dispose of personal property; and a sale by him of the personal assets of his testator to a firm of which his co-executor is a member, is not *ipso facto*, if there is no fraud, void. A sale by him and his co-executor to a firm so composed, would be liable to be set aside in equity, both on account of fraud, and for any inadequacy of consideration. *Colgate's Ex'r v. Colgate*, 372

2. The executors having terminated the partnership of their testator pursuant to their powers, that termination of it is valid so far as to protect the firm from being liable to the estate for a share of the profits since made, and to protect the estate from a share of the losses. *Ib.*

See ADMINISTRATION DE BONIS NON.
CONTRACT, 6.
PLEADING, 4, 6.
WILL.

EXECUTORY CONTRACT.

1. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se*, or *malum prohibitum*. It would not create a trust in such case. *Owens v. Owens*, 60.
2. Courts of equity have recognized and established this distinction between conveyances and executory contracts: where the title is vested, they never avoid it for want of consideration; and on the other hand, they never enforce an executory contract without consideration—they treat it as a nullity. *Ib.*
3. The conveyance of the debtor's real estate having been made for a sum much less than its value, and the circumstances connected therewith showing that the conveyance was made to defraud complainants, it is void against them, and the lands will be sold to satisfy their judgment. *Ib.*

See SALE.

FEME COVERT.

No decree can be made against a wife, to execute a deed. *Pinner v. Sharp*, 274

See SPECIFIC PERFORMANCE, 17.

FRANCHISE.

See RAILROAD COMPANY, 1, 5, 6.

FRAUD.

1. If a shareholder in a national bank places part of his shares in the hands of a third person to hold for him, under a secret declaration of trust, allows him to be elected a director, and himself votes for him, and allows him for years, although he owns no other shares, to take the oath required by the National Banking Law, that he is the *bona fide* owner of such stock, and declares that one of his objects in doing so is to give him credit and aid him in business, this is such fraud as will estop him from denying that such actual holder was the owner of the shares, as against a creditor who trusted him on the faith of being such owner. *Young v. Vough*, 325
2. Suspicious circumstances attending the confession of a judgment, in the absence of proof that the debt was not real, or that it was got up for a fraudulent purpose, will not warrant such decree. *Morris Canal & Banking Co. v. Stearns*, 414
2. A conveyance by a debtor to his wife after he contracted part of the debt for which complainant has a judgment, the residue being contracted afterwards without any notice to the complainant of the conveyance except the record of the deed, and the wife having knowledge of contracting the debt, is void as against the complainant. *Ib.*

See FRAUD, 3.

GRANT.

See RAILROAD COMPANY, 5, 6.

GUARANTY.

The guaranty of a bond cannot cre-

ate a lien by way of mortgage on real estate of the guarantor, nor will the fact that such bond is secured by a second mortgage on lands upon which the guarantor holds a prior lien by mortgage or judgment, create a lien on such lands, or the interest which the guarantor has in them. *Gausen v. Tomlinson*, 405

bal understanding that it was for the purpose of enabling them to carry out the agreement of equalization, no implied promise arises that these grantees will pay to him the amount specified in the deed as the consideration of the conveyance. The circumstances negative such implication. *Belden v. Belden*, 350



HEARING.

See PRACTICE, 7.

HIGHWAY.

See DEDICATION, 1, 2, 3, 6.

HUSBAND AND WIFE.

A conveyance made by a husband to a trustee for the use of his wife, on the execution of articles of separation between them, will not be set aside on account of the subsequent adultery of the wife while living separate from him. *Dixon v. Dixon*, 316

See ABANDONMENT.

IMBECILITY.

In cases of alleged want of mental capacity, the test is whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. *Lozear v. Shields*, 509

IMPLIED PROMISE.

Where the children and devisees of a testator executed a written agreement to divide all his property equally, although his will gave to his three sons a valuable lot, and divided the residue of his estate equally between his sons and daughters, and one of the sons at the signing of such agreement execute to the other sons a deed for his share in that lot, with the ver-

INFANT.

1. A conveyance or declaration of trust by an infant, by a deed actually delivered, is voidable, but not void. But the infant, after coming of age, may by his acts confirm the deed. *Owens v. Owens*, 60
2. A direction by a testator that his executors invest \$25,000 of the estate and pay the interest thereof to his daughter during her life, and after her decease that the executors appropriate and expend the legal interest of said sum toward the proper maintenance and education of the daughter's child or children, authorizes only so much of the income to be expended as will maintain and educate her child in a manner proper or suitable to his condition or fortune. Under such direction, no part of the income could be appropriated to the support of the father without an order. *McKnight's Executors v. Walsh*, 136
3. In general, a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court, based upon his inability to support them properly. *Id.*
4. Nor is he entitled to the whole of the income of his child's estate, on the ground that it is necessary to enable him to support and maintain an establishment suitable for such child as a member of his family. Where the executor has paid over the whole income, in

such case, to the father, such payment will not be confirmed, even if made in good faith. 16.

5. In a case where an infant appears by his guardian *ad litem* only, and the interests of the infant require it, the guardian will be directed to employ counsel approved by the court to represent him. *Colgate's Est'r v. Colgate*, 372

See LEGACY, 3, 4.

INJUNCTION.

1. Bill to restrain purchaser of a mortgage from a trustee from using and misapplying trust funds. The answer formally denied the facts, but injunction continued till final hearing, on the ground that the purchaser had knowledge of circumstances which should have excited his suspicion, and put him upon inquiry. *Dey v. Dey*, 88
2. An injunction will not be dissolved or refused upon new matter set up in the answer, not responsive to the bill. *Armstrong v. Potts*, 92
3. Where a congregation has agreed to allow a credit to its pastor of \$2000 on a certain bond given to the corporation, and the trustees have acquiesced in that agreement, the pastor is entitled to an injunction to restrain an action at law upon the bond, and the trustees cannot, in such a suit, thwart the wishes or deny the power of their *cestui que trust*. *Worrell v. Presbyterian Church*, 96
4. Motion to dissolve injunction not granted, though the equities of the bill were denied by the answer, the circumstances of the case being such as to withdraw it from the operation of the general rule. Injunction continued upon terms. *Murray v. Elston*, 127
5. The New Jersey Stock Yard and Market Company leased to the Manhattan Manufacturing and Fertilizing Company certain premises for the specified business of manufacturing and preparing fertilizers and manures, and the materials for that purpose. The lessors gave the lessees "the refusal and exclusive right of saving and taking all the blood of animals slaughtered in their abattoir and sheep-house, and of saving and taking the animal matter and ammonia from their rendering tanks, and of using the same in their business." The fertilizing company thereby bound themselves "to save all that is possible of the blood of the animals slaughtered, and the animal matter and ammonia from the tanks, to prevent any effluvia or stenches from escaping, and to prevent any and all nuisances from being created in any manner whatsoever, either in saving the blood, animal matter, or ammonia, or in converting the same into articles of commerce." The stock yard company subsequently leased their abattoir to Payson and Sherman. Sherman entered into partnership with two other of the defendants (at the time of the lease in the employ of the stock yard company,) under the name of the Bergen Manufacturing Company, for the manufacture of albumen and fertilizers. The complainant demanded all the blood of the animals slaughtered at the abattoir, but by an arrangement with certain butchers who slaughtered there, the Bergen Manufacturing Company have been and are taking a large part of the blood. *Held*, on application for injunction, that with every permission to use the abattoir after the lease, the stock yard company had the right to demand that every user of the abattoir should leave these matters for the complainant; and this, by its covenant, it was bound to do. And the defendants, having notice of this obligation, must be restrained from taking the blood and other matters which the complainant is entitled to take under its lease. *Manhattan Man'g Co. v. Stock Yard Co.*, 161

6. Such injunction is not mandatory. It does not require the delivery of the blood, but restrains the defendants from permitting any others than the complainant to take it. *Ib.*
 7. The remedy at law is inadequate. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion. *Ib.*
 8. It is not necessary for the purpose of an injunction that the odors or gases arising in the carrying on of the defendant's business should be noxious or unwholesome; it is sufficient if they be so offensive or disagreeable as to render life uncomfortable. *Meigs v. Lister*, 199
 9. A mistake in the name of the location of the defendants' works whence the nuisance arises, cannot affect the question. *Ib.*
 10. That a nuisance is not constant does not affect the right of a party injured thereby to protection. *Ib.*
 11. A party's right to relief from the nuisance of the defendants' works is not affected by the allegation (were it true) that the locality is surrounded by other nuisances, and dedicated to such purposes. *Ib.*
 12. If there are several nuisances of the like nature surrounding the complainants, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*. *Ib.*
 13. That the city of New York should have some place where it can deposit and utilize its filth, and that it has selected the place in this state where the defendant's works are carried on, will not compel the complainants to submit to the injury as a *damnum obsequie injuria*. What place such filth could be taken to where it would be less injurious than the place so selected, is not a question for the consideration of this court. *Ib.*
 14. Where the fact of the nuisance is free from doubt, a delay of several months will not prevent relief by preliminary injunction. *Ib.*
 15. The equities of the bill being denied, injunction dissolved, and motion for receiver refused. *Moies v. O'Neill*, 207
 16. That the partnership business is unprofitable and the partnership should be dissolved or discontinued, is not a sufficient ground for enjoining one of the partners from going on with the business and settling up the affairs, or for taking the property out of his hands to be administered by a receiver. *Ib.*
 17. Upon the argument of a rule to show cause why an injunction should not issue in a case where an injunction had been granted in part, the question whether the existing injunction should not be removed, cannot be considered. That can be removed only upon notice and motion to dissolve, in accordance with the rule of the court. *Fertilizing Co. v. Van Keuren*, 251
 18. The whole equity on which the injunction is founded being denied, and the complainant having an adequate remedy at law for the grievances stated in the bill, if they exist, injunction dissolved. *Breuer v. Day*, 418
- See ACQUESCENCE.
 DEDICATION, 5.
 MORTGAGE, 19, 20.
 PARTNERSHIP, 15.
 RAILROAD COMPANY, 2, 3, 4.
- INTEREST.
- See MASTER'S REPORT, 8.
 TRUSTEE, 3, 5, 10, 14, 19.
- ISSUE.
1. Where a question was one proper

to be tried on an issue directed, if such issue had been applied for, but both parties have proceeded to take testimony at great length, and allowed the hearing to be brought on, without applying for an issue, it is the province and duty of this court to decide it, if the evidence is such that the court can arrive at a satisfactory conclusion. *Denton v. Leddell*, 64

2. When the fact of a nuisance is clear, especially when it is not disputed, a court of equity will interfere without a trial at law. *Ib.*

3. An order of the Chancellor, made at the final hearing, for an issue to be tried by a jury, is appealable. *Newark and New York Railroad Co. v. Mayor of Newark*, 515

4. On an appeal from such an order, the court, in its discretion, will decide the entire controversy or send the case back with instructions. *Ib.*

5. If the issue is a simple one and the evidence is defective, the case should not be referred to a jury, but the taking of further evidence ordered. *Ib.*

JUDGMENT.

See FRAUD, 2.

JUDGMENT CREDITOR.

See ACQUIESCENCE.

FRAUDULENT CONVEYANCE.

JURISDICTION.

1. The next of kin may maintain a suit in equity for his distributive share, and although the courts of law and the Orphans Court have jurisdiction in such case when there has been a decree of distribution, yet the suit will be maintained by this court; and when there has been no decree of distribution, the

remedy must be in equity. *Dorshheimer v. Rorback*, 46

2. Where a question was one proper to be tried on an issue directed, if such issue had been applied for, but both parties have proceeded to take testimony at great length, and allowed the hearing to be brought on, without applying for an issue, it is the province and duty of this court to decide it, if the evidence is such that the court can arrive at a satisfactory conclusion. *Denton v. Leddell*, 64

3. When the fact of a nuisance is clear, especially when it is not disputed, a court of equity will interfere without a trial at law. *Ib.*

4. In a suit upon an instrument as follows: "Borrowed and received of S. M. N., \$5000 in seven and three-tenths treasury notes, which we promise to return on demand, with all interest due thereon," against the maker and his surety, the defence that the bonds were sold and the proceeds accounted for to the lender, is a defence to the undertaking, not in discharge of the surety. It is not an equitable defence, but a strictly legal one, and a court of law is the proper tribunal for its trial. *Linn v. Neldon's Adm'r*, 169

5. The fact that the rules of evidence will not permit the surety, at law, to avail himself of the only existing proof of his defence, will not entitle him to relief in equity. *Ib.*

6. This court has the power to declare a contract of marriage void, when entered into under circumstances that make such contract invalid. *Selah v. Selah*, 185

7. A court of equity has no jurisdiction to remove an officer from an office of which he is in possession, or to declare such office forfeited. But when, in a suit of which equity has jurisdiction, the question of the right to an office, or as to the regularity of an election, arises, and must be decided to ob-

tain the equitable relief, that court is competent to inquire into and decide these matters for the purpose of the suit. But its decision will not, like that of a court of law, upon a *quo warranto* or *mandamus*, operate *in rem*, and remove or oust any one from an office which in fact he holds. *Johnston v. Jones*, 216

8. To enforce trusts, suppress frauds, and compel the performance of contracts, are peculiarly within the province of a court of equity. These ends may be attained by injunction, decree for specific performance, or both. If the subject matter be within the jurisdiction of the court, all its powers and process will be used to effect the object to be attained. *Ib.*

9. That the defendant obtained an office claimed by him in a corporation by an election procured to be held by him by fraud, by breach of trust and a positive agreement, by concealment and treachery, confers on a court of equity jurisdiction to inquire into the validity of such election, for the purpose of restraining the acts of the defendant and other persons claiming office by such election. This could be done, even if the election held in such breach of trust had been conducted in the manner required by law, and would not be set aside by the courts of law. *Ib.*

10. When the object of a bill, filed in the name of a corporation, is to restrain acts of the defendants which they could only legally do as directors, they must show either a legal election that would put them in possession of the offices, or that they are *de facto* directors of the corporation; and these facts must be determined by the court in order to decide whether the answer is sufficient to dissolve the injunction. *Ib.*

LACHES.

1. Courts of equity will refuse relief

even in cases of breach of trust on account of the laches or unreasonable delay of those concerned to apply for relief. This doctrine is somewhat in analogy to the statute of limitations at law. But the time which constitutes the laches depends on the circumstances. In this case the suit was commenced seventeen years after the oldest son of the intestate, and five years after the youngest son came of age, and it was under the circumstances held not to be such laches as will bar the relief. *Smith v. Drake*, 302

2. Such relief is always granted on equitable terms. The purchaser in this case was allowed the value added to the property by the improvements erected by him and the debts of his intestate, which he had paid out of the money arising from the sale declared void, with interest from the date of each payment, and was charged with the rent or occupation value of the premises from the time of the purchase, less one-third during the life of the widow of the intestate who had conveyed to him her right of dower. *Ib.*

See INJUNCTION, 14.

SPECIFIC PERFORMANCE, 9.

LANDS LIMITED OVER OR IN CONTINGENCY.

See SALE OF LANDS.

LANDS UNDER WATER.

1. The act of March 30th, 1869, authorizing the New York and Long Branch Railroad Company to extend their road across the Raritan river, and to cross the river by a bridge, gave that company an absolute, unconditional authority to enter upon and appropriate the lands of the state under water, without compensation. *Pennsylvania Railroad Co. v. New York and Long Branch Railroad Co.* 157

2. The grant to the United Companies, by the act of March 31st, 1869, of the right to reclaim and erect wharves and other improvements in front of any lands owned by them, or either of them, adjoining any tide waters of this state, and when reclaimed and improved, to hold the same as owners, is subject to the authority given to the New York and Long Branch Railroad Company, to enter upon the lands of the state for the purpose of building such bridge. The Pennsylvania Railroad Company, therefore, the lessee of the United Companies, who owned lands at South Amboy, in front of which the New York and Long Branch Railroad Company have commenced to build said bridge, has not, under said act, a right of property in these lands under water, for which compensation must be made before these lands can be taken. *Ib.*
2. If a testator, after several money legacies, gives "whatever of my property shall remain after payment of the above," to two persons named, and one of the money legacies lapses by the death of the legatee in testator's life, such lapsed legacy does not fall into the residue; but as to it, the testator is intestate. *Ib.*
3. Where executors authorized to pay legacies given to testator's infant children by transfer of lands, convey part of the lands set aside for that purpose to one of their number—the mother of an infant child—in trust for the infant, these lands, upon the death of the infant, are to be considered as real estate, and descend to her heirs-at-law, and do not go to her next of kin. *Stevens' Adm'r v. Stevens' Ex'r*, 296
4. When legacies so authorized to be paid in land are directed to be held by the executors for the infant child until it attain a certain age, a conveyance to one of the executors in trust for the infant, according to the provisions of the will, will be held a proper setting aside of such lands and conveyance for the benefit of such child. *Ib.*
5. A gift of all the residue of the testator's estate not before disposed of, contained in a will which only directs the payment of debts and bequeaths pecuniary legacies with other provisions, makes these legacies a charge upon the real estate, when it appears that the testator had not at his death, or the time of making his will, sufficient personal property to discharge these legacies. *Corvine v. Corvine's Ex'r*, 368
6. Specific bequests cannot be made to contribute to make good a deficiency to pay pecuniary legacies. *Ib.*

See WILL.

LAPSED LEGACY.

See LEGACY, 1, 2.

LATENT AMBIGUITY.

See WILL, 9.

LEASE.

See AWARD, 5.

LEGACY.

1. The rule of law is well settled, that a general or absolute gift of the residue of an estate will carry with it all legacies which have lapsed by the death of the legatee in the life of the testator. But this rule, like all other general rules for the construction of wills, is limited to cases where the testator has not shown a different intention; and where the testator has limited or circumscribed the residuary bequest or devise, it does not prevail, unless the terms by

LIFE INSURANCE POLICY.

See ASSIGNMENT, 3—9.

LIMITATIONS, STATUTE OF.

In equity the defence of the statute of limitations may be set up by plea, answer, or demurrer; but if not set up in any way in the pleadings it cannot avail. *Ruckman v. Decker*, 283

See DEMURRER, 2.

LOTTERY.

1. A bill by a partner of a lottery firm against his co-partners for discovery, for a sale of the property, and a distribution of the proceeds, will not be entertained by this court. *Watson v. Murray*, 257

2. Even were the partnership contracts entered into in such states where such contracts are legal, this court will not enforce or administer them. *Ib.*

3. A contract which, though valid and would be enforced in the state where it was made, is in violation of a public law of this state, will not be enforced here, on the ground of comity. *Ib.*

4. It will not avail the complainant that his suit is not to enforce an illegal contract, but simply to compel an account and distribution of profits already made. Such distinction cannot be invoked where the illegal act is also a misdemeanor, punishable by fine or imprisonment. *Ib.*

MAINTENANCE.

See ABANDONMENT, 1.
INFANT, 2, 4.

MARRIAGE.

This court has the power to declare

a contract of marriage void, when entered into under circumstances that make such contract invalid. *Selah v. Selah*, 185

See WILL, 8.

MARRIED WOMEN.

1. An agreement to convey from one married woman to another, is inoperative and void. *Tunnard v. Littell*, 264

2. A married woman cannot charge her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or her estate. *Perkins v. Elliott*, 526

3. The rule is the same, whether such separate estate has been created by deed or will, or by force of the statute relating to the property of married women. *Ib.*

4. A married woman executed a joint and several note with her husband, stating therein that the money was to be a charge on her separate estate, and it appeared that this money was to be applied to the payment of a mortgage given by the husband and the wife on the lands of the husband. *Held*, that the feme was bound, as she derived a benefit from the transaction, in relieving the lands in which she had a dower right from the encumbrance. *Ib.*

See FEME COVERT.

SPECIFIC PERFORMANCE, 17.

MASTER'S REPORT.

1. The only matter that can be considered upon exceptions to a master's report, is the validity of the exceptions. The question whether there should have been a reference having been considered and determined when the order was made, cannot be reviewed on the argument on the exceptions. *Bank of the Metropolis v. Sprague*, 81

2. The rule of the court is, that the report of a master on matters referred to him, will be taken as correct, until some error is shown. The burden of this is upon the exceptant. *Ib.*
3. The fact that a report contains surplusage will not set aside the other part of the report or sustain an exception. But where the master has ascertained and reported upon matters which are in themselves mere surplusage, as a means of arriving at the conclusions which he was required to report, as such they are proper to be stated in his report. *Ib.*
4. It is a proper ground of exception that the master, in his conclusions as to matters of fact, has made a report contrary to evidence. *Haulenbeck v. Cronkright*, 407
5. The conclusions of a master, who has examined and seen the witnesses, are always regarded in equity as entitled to great respect, and where his conclusions are clearly supported by competent witnesses who are unimpeached, his report will not be set aside because there is conflicting testimony, unless it clearly appears from the weight of such testimony and the nature of it, that the master has erred. No error appears here. *Ib.*
6. Where a trustee has kept his accounts in a negligent way, or kept no account whatever of his receipts, all presumptions should be strongly against him, and obscurities and doubts should not operate to his advantage, but adversely. But the rule will not be strictly applied when it will lead to conclusions at variance with the reasonable probabilities of the case. *Blauvelt v. Ackerman*, 495
7. When, from the whole case, the result at which the master arrived is as consonant with the evidence as a whole, and is as probably just with reference to the fixed and known data of the case, as any that could have been reached, though the court is unable to see with what precise view of the evidence the master reached the result, his report will not be set aside. *Ib.*
8. When the trustee has collected and charged himself with the rents arising from the trust property, in a statement of the account long open between the parties he will be allowed interest, to accrue from the date of the yearly receipts. *Ib.*
9. Report corrected in respect of interest. *Ib.*
10. Under the circumstances of this case, and the questionable manner in which the trust has been performed, commissions disallowed. *Ib.*
11. Whether the decretal orders in the suit have not settled the complainant's right to maintain his suit—*Quære*. *Ib.*

See EXCEPTIONS.
PRACTICE, 5, 6.

MECHANICS' LIEN.

1. The filing the written contract provided for by the second section of the mechanics' lien law, only protects the building from liens for work or materials furnished to the contractor. If the owner orders materials or employs mechanics on his own account, a lien attaches for the same. *Loan Association v. Albertson*, 318
2. The mechanics' lien law was not intended to protect purchasers or mortgagees, but mechanics and material-men only. Many of its provisions are necessarily, to effect its object, opposed to the policy of the registry acts of this state, and make it impossible for a mortgagee or purchaser, at certain times, to ascertain what encumbrances exist. The express provisions of this act cannot be construed against the plain meaning

of the words, so as to carry out the policy and intention of the registry acts. *Ib.*

3. A purchase money mortgage has preference over lien claims for work and materials put upon the property by contract with the purchaser, between the execution of the contract of purchase and the conveyance. *Strong v. Van Dusen*, 369

4. An assertion by the person holding the legal title to lands, made to parties about to erect buildings thereon under agreement with the person who has a contract of purchase therefor, that they would be perfectly safe in going on, is not a contract with them to put up the buildings. It is not such consent as will bind the owner or the property; to have such effect it must be in writing. *Ib.*

MERGER.

1. Stated generally, the law is that when the mortgagee purchases the equity of redemption of the mortgagor, his mortgage interest is extinguished. But this general doctrine is subject to qualifications. Merger is not favored in equity, and is never allowed, unless for special reasons and to promote the intention of the party. *Clos v. Boppe*, 270
2. Where the equities are subserved by keeping the mortgage alive, and no injury or injustice is thereby wrought, it is not extinguished. *Ib.*
3. Where the mortgaged premises were conveyed to a mortgagee, though not purchased by him, and he did not derive, or expect to derive, any benefit from the conveyance, and it was not his intention to have his mortgage extinguished, his interest does not merge, but the mortgage will be treated as a security for the amount advanced. *Ib.*

MISJOINDER.

See PLEADING, 2.

MISTAKE.

The general doctrine is, that for mistakes in law, neither courts of law or equity give relief, though it has been done in equity in a few exceptional cases, under circumstances that do not exist here. *Hampton v. Nicholson*, 423

MORTGAGE.

1. A mortgage given by a husband to a trustee for his wife, after he had become a member of a firm of which she had gone out, to secure to her the capital which she had contributed to the firm, but which had become insolvent before she left it, is void as against creditors of the firm. *Wheeler v. Kirtland*, 13
2. A mortgage given by a father to secure to a son, money of the son used by the father in the business of the firm, though given when the firm was insolvent, is valid. *Ib.*
3. Mortgage reformed, by substituting "heirs" for "successors," it having been the evident intention to mortgage the fee. Such reformation will not affect a subsequent judgment, the record of the mortgage being the only notice at the entry of the judgment, and that notice being of a conveyance for life only. *Ib.*
4. When the controversy is as to the fact whether a deed was intended as security only, the burden of proof is on the grantor, and his oath against that of the grantee is not sufficient to change a deed absolute on its face into a mortgage. *Freytag v. Hoeland*, 36
5. But where the mortgagee admits that he required an absolute deed as security for a debt, without any recital to show what the debt was,

- and the mortgagor testifies that the consideration expressed in the deed was the debt it was intended to secure, the burden of proof is on the mortgagee to show that it was given as security for a greater amount. *Ib.*
6. The grantee in such case must reconvey on payment of his debt, and if the net rents and profits exceed the amount the deed was given to secure, and interest, he must repay such excess. *Ib.*
7. An assignee takes a mortgage subject to all the equities to which it was liable in the hands of his assignor. And where the mortgage has been pledged as security for the payment of a note, he is entitled in a suit for foreclosure, only to a decree for the balance due on the mortgage, after deducting the amount of the note. *Kamenu v. Huelbig*, 78
8. Where the mortgagor has paid the note, and the note and mortgage have been delivered to him, he is subrogated in the place of the payee of the note as his assignee, and will be allowed the amount as a credit on the mortgage. *Ib.*
9. A deduction allowed by the payee from the amount really due on the note, does not enure to the benefit of the assignee. A receipt being taken in full of the payee's claim on the bond and mortgage, the mortgagor is entitled to a credit on the mortgage for the full amount of the note. *Ib.*
10. The pledging by note of a bond and mortgage as security for its payment is a lawful pledge. It does not require a sealed or written instrument to assign a bond even at law. In this case a mere delivery of the bond and mortgage would have been sufficient. *Ib.*
11. This assignment does not come within the provisions of the second section of the act of March 14th, 1863, (*Nix. Dig.* 613,) requiring it to be in writing; but if it did, the written pledge in this case is sufficient. *Ib.*
12. That the maker of the note pledging the mortgage as security for its payment was a married woman, does not affect the validity of the assignment. Her husband was present when she gave it, and approved it. *Ib.*
13. That the complainant did not know of this assignment, does not affect it. *Ib.*
14. That the mortgagee did not have the bond and mortgage in her hands for delivery, at the time she assigned them, was notice to the assignee that they were held by some one as owner or claimant. But he was entitled to no notice; he took them subject to all equities in this respect. *Ib.*
15. The amount for which the mortgage, against which relief is sought in this case, and which was fraudulently procured, should stand as security, determined; and decree that upon payment thereof the mortgage and bond secured by it be given up to be canceled. *Wright v. Smith*, 106
16. An agreement to extend the time of payment of a mortgage, in consideration for a note for \$500, is invalid, and an assignee of the mortgage, who had no notice of such agreement, and took the mortgage as then due and payable, is entitled at once, and before the extended time has elapsed, to a decree for the amount of the mortgage, less the value of the note. *Trusdell v. Jones*, 121
17. But the mortgagee, having covenanted with the assignee that a certain sum was due upon the bond, will be allowed to avoid the credit by giving up the note; otherwise the present worth of the note must be endorsed as a credit on the bond. *Ib.*
18. The mortgagee is bound to pay

- the tax on his mortgage, and cannot recover it of the mortgagor. *Pond v. Causdell*, 181
19. Bill by assignee in bankruptcy, to have a deed given by the bankrupt to A., declared void, and the true amount due on a mortgage given by him to M., alleged to be fraudulent, ascertained; and that the complainant may be allowed to redeem, or the mortgagee be decreed to assign, upon payment of that amount to him; and that the decree obtained in a foreclosure suit upon the mortgage, may be opened, and the sale under the execution issued in it stayed by injunction. The court held that the injunction which had issued upon filing the bill must be dissolved at the end of thirty days, unless the mortgagee should, within that time, on tender of the amount of his debt, interest, and costs, refuse to assign his mortgage, decree, and execution to the complainant; or, if he is not provided with funds to redeem, he may, at his election, have the injunction dissolved as to the sale, and have an order to compel the sheriff to pay all the proceeds of the sale, above the debts and costs of M., into court, to be disposed of on application for surplus moneys. *Jobbins v. Montague*, 182
20. A., not having answered, the allegations in the bill were held sufficient to sustain an injunction against paying over any of the proceeds of the sale to him. *Ib.*
21. The rule in equity is well established, that where mortgaged premises are sold in separate parcels successively to different purchasers, with covenants against encumbrances, the parcels are liable to payment in the inverse order of their sale. *Mount v. Potts*, 188
22. A release of any of the parcels of the mortgaged premises successively sold, from the mortgage, not only frees that parcel entirely from the lien, but also frees the parcel sold before it, or so much of that parcel as the parcel released would have satisfied if not released. And the mortgagee cannot, by a release, or any act of his, change the right of the purchaser of any of the parcels to have every parcel subsequently sold or its value first appropriated to the payment. *Ib.*
23. Where, after a sale of the mortgaged premises in successive parcels, the purchaser of the parcel first sold gives another mortgage on that parcel, such second mortgage cannot be decreed, at the instance of the owners of the third and fourth parcels, in a suit to foreclose the first mortgage covering the whole tract, to be paid by the mortgagee holding such second mortgage, on the ground of its being a personal obligation. *Ib.*
24. An agreement to pay the debts of another must be in writing. Such agreement can be enforced at law, and is no defence or set-off to a suit for the foreclosure of a mortgage debt. *Williams v. Doran*, 385
25. When the cancellation of a mortgage is procured by fraud, or made by mistake, or without authority and without actual payment and satisfaction, the canceling will be set aside and the mortgage enforced. *Dudley v. Bergen*, 397
26. In a foreclosure suit no claims or debts against the complainant can be set off against the mortgage debt, except such as have been expressly agreed to be payment. *Ib.*
27. Priority of record will not give preference to one mortgage over another given at the same time and held by the same person. Such mortgages, in the hands of assignees, are concurrent liens, payable ratably out of the proceeds of the mortgaged premises, after payment of costs of both. *Gausen v. Tomlinson*, 405

28. When a mortgage has been cancelled without actual payment, on a mistaken supposition that a deed taken for the mortgaged premises merged and satisfied it, and a debt due from the mortgagor to such grantee has been given up and discharged on the belief that it was satisfied by the amount due for the conveyance, the canceling and satisfaction being entirely without consideration, a court of equity will set it aside and declare the debt a subsisting one. But the bill presents a different case. *Hampton v. Nicholson*, 423

29. Bill to foreclose. Defence, that the mortgagee did not intend to enforce the mortgage, but meant that it should be canceled at his death, not established. The paper alleging to have been executed for that purpose is not produced, nor its contents shown with distinctness and certainty. *Chew's Adm'r v. Chew's Adm'r*, 471.

See GUARANTY, 1.
MERGER.
USURY.

MULTIFARIOUSNESS.

See PLEADING, 1.

NOTICE.

See CORPORATION, 4.
EXCEPTIONS, 2.
PRACTICE, 12, 13.
SPECIFIC PERFORMANCE, 6.

NUISANCE.

1. Any citizen, acting either as an individual or as a public official, under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it property may be destroyed, and the owner deprived of it without trial, with-

out notice, and without compensation. *Fertilizing Co. v. Van Keuren*, 251

2. Such destruction for the public safety or health, is not a taking of private property for public use, without compensation or due process of law, in the sense of the Constitution. *Ib.*

See INJUNCTION, 10—14.
ISSUE, 2.

PAROL AGREEMENT.

A parol agreement by the grantee, at the time of taking a deed, that he would assume a mortgage upon the property as part of the consideration, will be enforced in equity. A covenant in the deed that the premises are free from encumbrances, or any other covenant, will not estop the assignee of such mortgage from recovering on such undertaking. *Wilson v. King*, 150

PART PERFORMANCE.

See SPECIFIC PERFORMANCE, 1.

PARTIES.

1. The sureties on an administrator's bond are proper, though not necessary parties in a suit in equity against the administrators for a distributive share. *Dorsheimer v. Rorback*, 46

2. Ordinarily, a legatee or next of kin must sue the executor or administrator only for the legacy or distributive share; he cannot join with him the debtors to the estate, or other persons. But where there is collusion between the executor and the debtor or person having the property in his hands, or where the executor is insolvent, the debtor may be made a party, and recovery be had against him. *Ib.*

3. Ordinarily, it is not necessary to

make debtors of the decedent parties to a bill against the executor by creditors or legatees. But when there is collusion alleged or suspected between the executor and the debtors, or he refuses to collect the debts, they are proper parties; and in case of a charge upon real estate, the heirs or devisees are proper parties with the personal representatives. *Evans v. Evans*, 71

4. In a suit by one of the next of kin of testator against his executors, where no account is called for, and where the complainant demands a certain aliquot part of a specific sum in which the other next of kin have no interest, they are not necessary parties. *Tindall v. Tindall's Ex'rs*, 244

5. To a bill by a *feme covert* by her next friend for her separate estate, her husband is a necessary party. *Tunnard v. Littell*, 264

See DOWER, 12.

PARTITION.

See DOWER, 2—4, 11—16.

PARTNER.

See EVIDENCE, 3.

PARTNERSHIP.

1. An entry made by one partner on the books of the firm during the co-partnership, will, after its termination, be evidence against the other partner, if he at the time knew of the entry, or had an opportunity to examine the books and did not dissent from it. *Dunnell v. Henderson*, 174
2. If one partner agrees to contribute the stock on hand in his business and the other assets of that business, against a specified sum to be put in by the other partner, this stock and assets, and that only,

must be put in as the capital of the concern, whether it exceeds or falls short of the amount stipulated by the other partner. *Ib.*

3. A new foundation for a new engine put in a mill in place of an old one discarded, built for it because the foundation of the old engine, if repaired, was not sufficient for the new engine, must be considered as an addition and not as repairs, under articles distinguishing additions from repairs. *Ib.*

4. Land bought with partnership funds, although the title be taken in the name of one of the partners, will be treated in equity as partnership property. *Derency v. Mahoney*, 247

5. The same principle applies to improvements made with partnership funds on the separate property of one of the partners. *Ib.*

6. It is not necessary that judgment should be first obtained against the co-partner in whose name the title is vested, to enable a partner to maintain a suit in equity for an account, and to have the property declared partnership assets. *Ib.*

7. The rule that a fraudulent or voluntary transfer of property cannot be contested by a creditor at large, but only by one who has obtained a judgment that would be a lien upon the property if not transferred, is well established, but does not apply to a partner calling on a co-partner to account. *Ib.*

8. Where a part of the purchase money of the property alleged to have been fraudulently conveyed by a partner remains unpaid at the time of filing a bill for account against him, the grantee, as to that amount, is not a purchaser for value without notice. And the property is liable to that amount, with interest from the date of the conveyance, provided so much of the partnership funds have been expended thereon. *Ib.*

9. An agreement by R. to join with W. in the business of planting and selling oysters, by which R. was to find the capital and W. to go to Virginia and plant and buy oysters, to be sent to R. in his vessels to New York for sale, each to have one-half of the net profits, is a partnership. *Ruckman v. Decker*, 283
 10. On the termination of such partnership, planted oysters remaining in the beds after payment of all partnership debts, are the common property of both partners, of which, as in case of any personal property held in common, one tenant in common cannot dispose of the share of the other without his authority. *Ib.*
 11. If such tenant in common turn over such property to a firm of which he becomes a member, such firm is accountable to the other tenant in common of the property, for the value of his share of the property so turned over and used by the new firm. *Ib.*
 12. The purchase of the property of one man from another who is in possession of it, without authority from the true owner to sell it, will not change the title, nor protect such purchaser against the true owner. The doctrine of equity, which protects a *bona fide* purchaser without notice, only applies to a purchaser of the legal title, without notice of the equitable title of a third person. And in such case notice to one partner would be held as notice to the firm. *Ib.*
 13. The admissions of one partner are evidence against the others, in a suit brought against all for partnership liabilities. *Ib.*
 14. The executors having terminated the partnership of their testator pursuant to their powers, that termination of it is valid so far as to protect the firm from being liable to the estate for a share of the profits since made, and to protect the estate from a share of the losses. *Colgate's Ex'r v. Colgate*, 372
 15. When upon motion to dissolve an injunction granted in a suit by one partner against another for a dissolution, an account and a receiver, it appeared that the defendant had deliberately resolved to break up and ruin the business of the firm, and the personal relations of the two partners were such that they could never carry on the business together to advantage, the injunction was retained and a receiver appointed. *Sutro v. Wagner*, 388
- See EXECUTOR, 2.
INJUNCTION, 16.
- PLEA.
1. A plea that the complainant "is incapable of taking care of herself or her property," not specifying the particular incapacity, is bad and insufficient. *Corties' Ex'rs*, 197
 2. A plea that goes to the whole bill, and is coupled with an answer not in support of it, but which denies the equities set up in the bill, is overruled by the answer. *Ib.*
 3. A motion to strike out an insufficient plea is not correct practice. The plea should be set down for argument. *Ib.*
- PLEADING.
1. A bill by a husband and wife, praying performance of one or the other of two agreements—the one a parol agreement made with the husband, and the other a written agreement made with the wife—both for the conveyance by the defendant of the same premises upon the same terms, is not multifarious. *Green v. Richards*, 32
 2. Such bill might have been demurrable for a misjoinder. But here the error is not such that the court

- will refuse relief on this technical objection, after the defendant has allowed the cause to proceed to hearing. *Ib.*
3. An answer, though responsive on the point in controversy, sworn to before an officer in another state, not authorized by the statutes of this state or the rules of this court to take an oath to an answer, has no weight as evidence; it must be treated as a pleading only. *Freytag v. Hoeland*, 36
4. Where executors are directed by the will to pay money into the estate, and are personally bound so to do, and are directed out of such fund to pay a legacy to a co-executor, but fail to pay the money into the estate, such co-executor may bring suit in a court of equity in his individual right, against the executors individually, to compel the payment of the legacy. *Evans v. Evans*, 71
5. In any suit which necessarily should be brought by a complainant as executor against the defendants as such, if the allegations in the bill are sufficient to bring them before the court in that character, it is not necessary that they should be styled such, either in the process, or in the commencement of the bill, or in the prayer for process. *Ib.*
6. Ordinarily, it is not necessary to make debtors of the decedent parties to a bill against the executor by creditors or legatees. But when there is collusion alleged or suspected between the executor and the debtors, or he refuses to collect the debts, they are proper parties; and in case of a charge upon real estate, the heirs or devisees are proper parties with the personal representatives. *Ib.*
7. An objection that the corporate character of the defendants does not sufficiently appear by the bill, and that no proper averments are therein made of ecclesiastical relations and rules, which have been waived or substantially supplied by the answer and proofs, cannot avail at the final hearing. *Worrell v. Presbyterian Church*, 93
8. If there are several nuisances of the like nature surrounding the complainants, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*. *Meigs v. Lister*, 199
9. Uncertainty in material allegations is not fatal to a bill whose object is the discovery of material facts alleged to be entirely in the defendant's knowledge. *Watson v. Murray*, 257
10. To a bill by a *feme covert* by her next friend for her separate estate, her husband is a necessary party. *Tunnard v. Littell*, 264
11. In equity, the defence of the statute of limitations may be set up by plea, answer, or demurrer; but if not set up in any way in the pleadings it cannot avail. *Ruckman v. Decker*, 283
- See DIVORCE, 1.
LIMITATIONS, STATUTE OF.
PARTIES.
- POLICY OF INSURANCE.

See ASSIGNMENT, 3—9.
- POWER.
- A court of equity will sometimes aid the defective execution of a power, but will never confirm a sale made without any power. *Hampton v. Nicholson*, 423
- POWER TO BORROW MONEY.
1. A township committee in this state have no power to borrow money on the faith of the township, or to authorize any one to borrow money in the name of the township, or to bind the inhabi-

tants to the payment of money so borrowed. *Musgrove v. Kennell*, 75

2. But if the members of the township committee can persuade any one to loan money necessary for township purposes, they are at liberty to do so; and the borrowing or expenditure of such money will not be restrained. Such borrowing cannot affect the township or any inhabitant, unless the inhabitants, at a regular town meeting, adopt the loan and assume the debt. *Ib.*

PRACTICE.

1. Where the defence to a bill for foreclosure is that the amount for which the mortgage was given was not advanced, and the court, upon the evidence, adjudge the defence of usury is not sustained, and refer it to a master to compute the amount due upon the mortgage, evidence to show that the amount had not been advanced, is inadmissible. *Morris v. Taylor*, 131
2. When a cause is set down for hearing on the first day of the term, and the defendant gives notice of hearing of exceptions to the master's report at a later day in the term, but enters no rule to set down the hearing, and the exceptions are not placed on the calendar, and upon the call of the calendar the complainant's counsel tenders himself ready to move the cause, but cannot proceed until the exceptions are disposed of, the complainant is entitled to move at once at the same term, upon the overruling of the exceptions, for final decree. *Ib.*
3. Exceptions must be set down for hearing, and placed upon the calendar like the hearing of other causes, and notice thereof must be served fifteen days before the hearing, or the report will be confirmed as a matter of course. *Ib.*
4. The order setting down the exceptions for argument must be both

entered and served before the expiration of the time in the rule *nisi*, or the report will be confirmed. Either party may set them down for argument. *Ib.*

5. When the merits of the cause have been determined in the interlocutory decree and the reference is to compute amounts due, or to settle facts, and the master's report is confirmed upon exceptions taken, nothing further is to be done upon the cause being moved, when set down for further directions or final decree, than to decree the relief adjudged on the interlocutory decree for the amounts, or upon the facts settled by the master's report thus confirmed. The merits of the case determined by the interlocutory decree cannot be again gone into. *Ib.*
6. In case of a plain mistake of the master evident upon the face of the account, which was not included in the exceptions or considered in the hearing of them, the court will, in its discretion, correct the mistake, or defer the final decree until it can be examined into and corrected. But no such mistake is pointed out in this case. *Ib.*
7. Where the chief matter in controversy in two suits between the same parties is the same, and if that was settled there would be no substantial difference between the parties, and no possible injury can result, an order will be made that the testimony taken in either suit may be used in the other, and that the hearing of both shall come on together. *Evans v. Evans*, 180
8. When a marriage is sought to be declared void on the ground of the party's intoxication at the time of the ceremony, and that it was not consummated by cohabitation, the proceeding must be by bill, and not by petition. *Selah v. Selah*, 185
9. Where the marriage is not one declared originally void by the statute, and the case is one which

cannot be considered within its provisions, as included in the term void, the suit must be by bill. *Ib.*

10. Where the object of the suit is to declare a marriage contract void, for some cause not provided for in the act, the provision that the defendant shall not answer under oath, does not apply. *Ib.*

11. A commissioner appointed under the act of March 17th, 1862, has no power to adjourn the examination, but only to continue it when once commenced, from day to day, while actually proceeding with the examination of witnesses. *Parker v. Hayes*, 186

12. No notice having been given of the time and place of taking depositions, they must be suppressed. The adjournment does not supply the place of the notice required by the statute. *Ib.*

13. Upon the argument of a rule to show cause why an injunction should not issue in a case where an injunction had been granted in part, the question whether the existing injunction should not be removed, cannot be considered. That can be removed only upon notice and motion to dissolve, in accordance with the rule of the court. *Fertilizing Co. v. Van Keuren*, 251

14. A defendant cannot have any positive relief on his part touching the subject matter of the suit; the only judgment for him is to refuse the relief prayed for by the complainant. *Black v. Keiley*, 358

See EXCEPTIONS, 2, 3.
ISSUE.
MORTGAGE, 19.
PLEA, 3.

PRESUMPTION.

See BILL OF REVIVOR.
DEED, 1.
MASTER'S REPORT, 6.
RELIGIOUS SOCIETY, 1.

PRIORITY OF LIEN.

See MECHANICS LIEN, 3.
MORTGAGE, 21, 27.
REGISTRY.

PURCHASER.

1. The purchase of the property of one man from another who is in possession of it, without authority from the true owner to sell it, will not change the title, nor protect such purchaser against the true owner. The doctrine of equity, which protects a *bona fide* purchaser without notice, only applies to a purchaser of the legal title, without notice of the equitable title of a third person. And in such case notice to one partner would be held as notice to the firm. *Ruckman v. Decker*, 283

2. If an administrator or other trustee, directly or indirectly, purchase lands at a sale made by himself as such, the sale will be set aside on application of the parties really interested. *Smith v. Drake*, 302

3. A purchaser of lands from a grantee whose deed is void against the creditors of his grantor by the statute of frauds, will not be protected by the provisions of the sixth section in favor of *bona fide* purchasers for a valuable consideration, unless he has parted with something of value in the purchase. A conveyance or mortgage for a pre-existing debt, without parting with some security, is not for a valuable consideration within the provisions of that section. *Mingus v. Condit*, 313

4. A purchaser who accepts a deed by which no title is conveyed, where there is no mistake or misrepresentation as to facts, and no fraud and no warranty of title, has no redress at law or in equity. *Hampton v. Nicholson*, 423

See ACQUIESCENCE.

DEDICATION, 1, 2, 4, 6.

INJUNCTION, 1.

LACHES.

TRUSTEE, 1, 2, 23, 24.

RAILROAD COMPANY.

1. The franchise of the Camden and Amboy Railroad and Transportation Company, to perfect an expeditious and complete line of communication between the cities of Philadelphia and New York, and to build across the state a railroad, to be part of that line, is exclusive against all but the state and those upon whom the state has conferred it. *Pennsylvania R. R. Co., v. National Railway Co.,* 441

2. Any railroad over the state, wherever built, if built for and adapted to be part of a through competing line between said cities, is unlawful and liable to be enjoined, unless authorized by legislative enactment. *Ib.*

3. No authority is conferred by any or all of the charters together, of the several New Jersey corporations co-defendant with the National Railway Company, to build a road across the state, to be used for part of a competing line between the cities of Philadelphia and New York, and the attempt by the defendants to build such road is in fraud of the rights of the complainants, and will be enjoined. *Ib.*

4. The Pennsylvania Railroad Company, lessees of the works and franchises of the United Companies of New Jersey, by their failure to have their lease acknowledged or proved, and lodged for record with the secretary of state within thirty days after its execution, as required by law, are not thereby disentitled to an injunction to stay the threatened acts of the defendants. The lessors and lessees having together the whole legal ownership of the rights to be protected, are properly joined as

complainants. The property to be protected belongs to the stockholders whom the complainants represent; and the defendants being wrong doers, cannot set up the alleged uncertainty of legal relations between the complainants, to justify their own wrongful acts, or to prevent the appropriate relief. *Ib.*

5. The rule is well settled and of the highest importance, that legislative grants to private corporations are to be strictly construed. *Ib.*

6. The franchise of taking tolls upon public ferries, bridges, or highways, is a part of the sovereign prerogative, to be obtained only by grant. Railroads for popular use and for tolls are *publici juris*. *Ib.*

REALTY.

See LEGACY, 3, 5.

RECEIPT.

See ESTOPPEL, 2.

RECEIVER.

Where an executor who has had the actual management of the estate, has wasted or misappropriated the funds in his hands, and claims that he can permit a co-executor, now insolvent, to take funds of the estate, without being responsible, and has once permitted this, and such co-executor appropriated the funds so taken to his own use, a receiver will be appointed. *Price's Ex'r v. Price's Ex'rs,* 428

See INJUNCTION, 15, 16.

PARTNERSHIP, 15.

REGISTRY.

1. A mortgagee who knows that a prior encumbrance exists, or a concurrent legal encumbrance entitled to be a prior lien, will not be permitted by his act of registry,

to gain priority over the other for want of registry. *Matthews v. Everett*, 473

2. The statutes regulating the registry of deeds are statutes of notice. They are to prevent frauds and wrongful priorities, not to encourage or to shield them. *Ib.*

RELEASE.

See DEDICATION, 2.
WILL, 13.

RELIGIOUS SOCIETY.

1. It is no valid objection to the action taken at a meeting of a congregation, that members of the congregation were absent, or being present, did not vote. Where a society is composed of an indefinite number of persons, a majority of those who appear at a regular meeting constitute a body to transact business. The presumption is that all the members present who observe silence when a question is put, concur with the majority of those who actually vote—that is, if the question be put audibly and explicitly. *Worrell v. Presbyterian Church*, 96

2. The pastoral relation is for religious and not mercenary ends, but the contract involved in it imposes pecuniary obligations and gives pecuniary rights which the law enforces and protects, and the surrender of those rights, when it involves matter of pecuniary loss, is lawful matter of pecuniary compensation, and is a valid consideration for a contract to pay money. *Ib.*

3. In Presbyterian societies the congregation are the substantial beneficial owners of the church property, and the trustees the legal instruments to execute their will. *Ib.*

4. Trustees have no legal right to

attempt to defeat an agreement entered into by the congregation. *Ib.*

5. Where a congregation has agreed to allow a credit to its pastor of \$2000 on a certain bond given to the corporation, and the trustees have acquiesced in that agreement, the pastor is entitled to an injunction to restrain an action at law upon the bond, and the trustees cannot, in such a suit, thwart the wishes or deny the power of their *cestui que trust*. *Ib.*

RESIDUARY BEQUEST.

See LEGACY, 1.
WILL, 1, 7.

RESIDUE.

See LEGACY, 1, 2, 5.

RESULTING TRUST.

1. If a man, when insolvent or in debt, advances money as a gift to his wife or her father, they being at the time ignorant of the indebtedness or insolvency, and the donee receives the money in good faith, supposing that the donor was perfectly solvent and that the gift could not injure his creditors, present or future, and was not intended for such purpose, and purchases property or enters into business with the money, but afterwards, upon learning of the embarrassment of the donor, pays him back in full the amount received, there is no fraud in such transaction, or any other ground to infer or create a trust for future, or even existing creditors, in the property purchased and its advance, or in the profits of the business, after the money is returned, or even while it is kept in good faith. *Wheeler v. Kirland*, 13

2. A trust is held to result by operation of law, where one purchases land with his own money and

takes the conveyance in the name of another; in such case the title is deemed to be in trust for him who advanced the money. *Ib.*

3. If one purchases land, and takes the title in the name of his wife or child, it will be held to be a settlement on the wife or an advancement to the child, unless it is shown to have been otherwise intended, and no trust will result. But in such case, if the purchaser takes the deed in the name of his wife or child for the purpose of defrauding or delaying creditors, and not for the purpose of making a settlement or advancement, a trust will result to the purchaser, and the land be liable to his debts. *Ib.*

4. When the person to whom the conveyance is made makes the bargain for the purchase for his own benefit, and obtains part, or even the whole of the purchase money from another, who knows that it is to be paid for a conveyance to the grantee for his own benefit, no resulting trust can arise. *Ib.*

5. Where a wife purchases real estate for her own benefit, and the purchase is understood to be made for that purpose by the husband, and he advances the money therefor as a gift, no resulting trust is thereby created in him for the benefit of his creditors. *Ib.*

6. When the person to whom the conveyance is made pays part of the purchase money, no trust results to any one who advances the residue, unless the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced, is shown to have been paid for some specific part or distinct interest in the estate, for some aliquot part. A general contribution of a sum of money toward the entire purchase is not sufficient. *Ib.*

7. When a trust is sought to be raised as a resulting trust from the pur-

chase money, the proof must be clear of the payment of the purchase money by the person in whose favor a trust is sought to be raised. Such a trust must also arise at the time of the execution of the deed. It cannot be raised from subsequent matter arising *ex post facto*. *Tunnard v. Littell*, 264

REVERSIONARY CHOSE IN ACTION.

See ASSIGNMENT, 5—7.

REVERSIONER.

See DOWER, 15.

SALE.

One executor can sell and dispose of personal property; and a sale by him of the personal assets of his testator to a firm of which his co-executor is a member, is not, *ipso facto*, if there is no fraud, void. A sale by him and his co-executor to a firm so composed, would be liable to be set aside in equity, both on account of fraud, and for any inadequacy of consideration. *Colgate's Ex'r v. Colgate*, 372

SALE OF LANDS.

1. A sale of lands made by order of the Chancellor, by virtue of the provisions of the act to authorize the sale of lands limited over or in contingency, only conveys the estates of persons having vested or contingent estates in such lands, and who, by the statute, are required to have notice of the proceedings. The rights or liens of encumbrancers who are not required to have notice, or who do not have notice of the proceedings, are not affected by the sale. The purchaser holds subject to legacies charged on the lands. *Cool's Ex'rs v. Higgins*, 308

2. The Chancellor has no power to

order mortgagees or other encumbrancers to be paid out of the proceeds of such sale. The act requires that the whole proceeds shall be invested at interest, and directs specifically to whom the interest shall be paid. No other disposition can be made by the Chancellor. *Ib.*

3. Where the complainant's solicitor consented that the defendant might have an adjournment of the sale of his property, but, owing to the bad faith (if there was any) of the sheriff, or to the negligence of the defendant or the solicitor in not giving the sheriff instructions and attending the sale, the sale was proceeded with and the property struck off, the sale will not be set aside as against the complainant. He is entitled to his decree. *Williams v. Doran*, 385

See POWER.
PURCHASER, 2.
TRUSTEE, 22, 23.

SEALED INSTRUMENT.

When a party who cannot read is sought to be bound by a writing under seal, it must appear that he had it read to him or knew its contents. Where such a paper, for want of such due execution, is invalid and void, it will not protect administrators who have paid moneys, relying on it, that they paid the moneys in good faith. *Dorshheimer v. Rorback*, 46

SEPARATE ESTATE.

See MARRIED WOMEN, 2—4.

SET-OFF.

See MORTGAGE, 24.

SHARES IN CAPITAL STOCK.

Shares in the capital stock of corporations are neither money nor

securities, but simply the title of the corporator to his proportion of the corporate property and income. *Graydon's Ex'rs v. Graydon*, 229

SHELLY'S CASE.

See ESTATE TAIL, 3.

SPECIFIC BEQUEST.

See LEGACY, 6.

SPECIFIC PERFORMANCE.

1. Taking possession of the premises, under a parol agreement for their conveyance, is such part performance as will take the case out of their statute of frauds, and support the suit on the agreement; part payment will not. *Green v. Richards*, 32
2. A memorandum endorsed on a receipt, &c., as follows: "This is to show that I agree to sell to Mrs. G. house and lot No. 71 Ferry street, for the sum of \$2500, and that when there is \$500 paid, and the back rent, I will give her the deed and take a mortgage for \$2000. [Signed.] T. E. R.," is a contract certain and definite, except as to whether the mortgage should draw interest or not. But there being no agreement for time, and the purchaser not being entitled to any credit, a court of equity will presume it to have been the intention of the parties that the mortgage should be made payable on demand, and enforce the contract. *Ib.*
3. Where a party seeking specific performance of an agreement for the conveyance of lands, claims an allowance for the value of a certain tract to which he alleges the defendant has no title, he must show a title out of the defendant. *McDavid v. Pierrepoint*, 42
4. Where such complainant was in

- possession of the tract under the defendant, at the date of the agreement, as against him the title must be taken to be in the defendant, until the contrary appears by positive proof. *Ib.*
5. A claim for deduction on account of the want of possession of a part of the premises, refused, because the words in the agreement for conveyance, describing that tract as "a small piece near the said road in the tenure of Mrs. Whiteford," was a declaration that the defendant's estate was that of landlord or reversioner, and the fair construction and operation of the contract is to convey, subject to the estate which she might have in the premises. *Ib.*
6. The complainant's knowledge that Mrs. W. had occupied the lot for many years, at the date of the agreement, was sufficient notice to put him upon inquiry, and he must be charged with the notice he would have had if he had made inquiry. *Ib.*
7. Though a verbal understanding cannot alter a written agreement, yet if the agreement without it did not warrant the construction given to it, a court of equity would not compel specific performance of it in a manner contrary to the understanding between the parties at the time. *Ib.*
8. Specific performance will not be decreed, when it is against equity under the circumstances of the case. *Ib.*
9. The gross neglect on part of the complainant in the payment of interest and principal pursuant to the contract, and his laches in not tendering payment and bringing suit for nineteen years after he should have paid the whole consideration, and then not until an ejectment was commenced against him, would deprive him of the right to performance, if the defendant was not willing to perform. *Ib.*
10. Bill for specific performance of a parol contract to convey lands. No contract proved. *Frey v. Boylan*, 90
11. In view of the extraordinary circumstances under which the contract sought to be enforced was made, and its purely unilateral character, the court, in the exercise of its discretion, left the complainant to his action at law. *Pinner v. Sharp*, 274
12. A contracted with B to convey to him a lot of land, and to assure the title in fee simple, free from all encumbrances, with general warranty and the usual full covenants; and further, that he would assist B in defending a suit at that time pending on a lien claim, B agreeing to pay all the expenses of defending that suit. That suit was discontinued. In another suit arising out of this claim, judgment was given therefor, through the failure of A to defend the suit, and the judgment declared a lien upon the premises. *Held*, that B was entitled to a conveyance free from the lien of the judgment, and that A must pay the lien, or allow the amount to be deducted from the contract price still due. *Millard v. Merwin*, 419
13. Where, under a devise to A, B, and C, and if any of them should die leaving no lawful issue, then to the survivors, A and B conveyed and released the real estate so devised to C, by deed with full covenants, including a general warranty, C has a good and indefeasible title thereto, and a contract for the purchase of such real estate will be enforced. *Veeland v. Blauvelt*, 483
14. In such case, if C survived A and B, and died without lawful issue, the issue of A or B, (should any there be,) would not take by virtue of the devise. C's estate is defeasible only by his death without lawful issue, and in the lifetime of either A or B. But at that instant

their estate passes by the conveyance. *Ib.*

15. A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might consider it good, still the contract may not be specifically enforced. But there must be some debatable grounds on which the doubt can be justified. *Ib.*

16. An unilateral contract will in no case be enforced in equity, unless, at the time of the decree, both parties can be bound by it. *Richards v. Green*, 536

17. A *feme covert* cannot obtain a decree for a specific performance of a contract which is not binding upon her. *Ib.*

18. A vendee of land went into possession under a parol agreement to purchase. Afterwards, with his assent, a written promise was given by the vendor, with the consent of the vendee, to convey the premises upon the original terms, to the latter's wife. Specific performance was decreed. *Ib.*

STATUTE, CONSTRUCTION OF.

1. The act of March 30th, 1869, authorizing the New York and Long Branch Railroad Company to extend their road across the Raritan river, and to cross the river by a bridge, gave that company an absolute, unconditional authority to enter upon and appropriate the lands of the state under water, without compensation. *Pennsylvania R. R. Co. v. N. Y. & L. B. R. R. Co.*, 157

2. The grant to the United Companies, by the act of March 31st, 1869, of the right to reclaim and erect wharves and other improvements in front of any lands owned by them, or either of them, adjoining

any tide waters of this state, and when reclaimed and improved, to hold the same as owners, is subject to the authority given to the New York and Long Branch Railroad Company, to enter upon the lands of the state for the purpose of building such bridge. The Pennsylvania Railroad Company, therefore, the lessee of the United Companies, who owned lands at South Amboy, in front of which the New York and Long Branch Railroad Company have commenced to build said bridge, has not, under said act, a right of property in these lands under water, for which compensation must be made before these lands can be taken. *Ib.*

3. That the act authorizing the bridge did not provide for a draw does not invalidate it; nor does the fact that no draw was provided for until the act of April 1st, postpone the taking effect of the act of March 30th, until that day. The act took effect immediately. *Ib.*

STATUTE OF FRAUDS.

See PURCHASER, 3.

STOCKHOLDER.

See CORPORATION, 5, 6.

SUBPENA DUCES TECUM.

1. A party to a suit can be compelled by a subpoena *duces tecum*, to produce papers and documents to be used on the trial as evidence. *Murray v. Elston*, 212
2. A subpoena *duces tecum* commanding a party only to appear at a certain place and time named in the writ, and bring with him a certain book, but omitting the direction to testify, is invalid, and the party refusing to obey it cannot be attached for contempt. *Ib.*

SUBROGATION.

A by-law of a national bank, declaring that no shares shall be transferred while the holder is indebted to the bank, is authorized by the act of Congress, and is a reasonable by-law; and any attempted transfer by the shareholder while indebted to the bank, is void. And an endorser who pays the note by which such debt is created, is subrogated to the rights of the bank as against such shares of its capital stock. *Young v. Vough*, 325

See MORTGAGE, 8.
WILL, 13.

SUPPLEMENTAL ANSWER.

See ANSWER.

SURETY.

See ADMINISTRATOR'S BOND.
JURISDICTION, 4, 5.
MARRIED WOMEN, 2, 3.
PARTIES, 1.

SURVIVOR.

See DEVISE, 1, 2.

TAX.

See MORTGAGE, 18.

TOWNSHIP COMMITTEE.

See POWER TO BORROW MONEY.

TRIAL AT LAW.

See ISSUE, 2.
JURISDICTION, 4.

TRUST, DECLARATION OF.

1. A declaration of trust, though not

executed at the same time and place with the deed whose purposes it declares, being dated on the same day, and being the consideration of the deed, must be considered as part of the same transaction, and they must be construed together. *Ownes v. Ownes*, 60

2. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se*, or *malum prohibitum*. It would not create a trust in such case. *Ib.*

3. But where the trust is declared by a writing executed and delivered, and the estate is vested in the complainant, and the object of the suit is to compel a naked trustee to convey the property held in trust to the *cestui que trust*, it will not bar the relief sought, that the conveyance to the trustee was made for the purpose of delaying and defrauding the complainant's creditors. *Ib.*

4. If, instead of a declaration of trust, the instrument executed had been a mere contract to re-convey the property; or if the bill had been filed to establish a trust, either as a resulting trust or on a parol agreement; then the defence that the conveyance had been made to delay and defraud creditors would bar the relief. *Ib.*

5. Courts of equity have recognized and established this distinction between conveyances and executory contracts: where the title is vested, they never avoid it for want of consideration; and, on the other hand, they never enforce an executory contract without consideration—they treat it as a nullity. *Ib.*

6. A conveyance or declaration of trust by an infant, by a deed actually delivered, is voidable, but not void. But the infant, after coming of age, may by his acts confirm the deed. *Ib.*

TRUSTEE.

1. A trustee, so far as the trust extends, can never be a purchaser of the property embraced under the trust, without the consent of all persons interested. *Wright v. Smith*, 106.
2. The rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are engaged for that purpose and paid for it. *Ib.*
3. Where a trustee has invested the trust fund in business, trade, or speculation, he can be called upon to account for the profits made by it, or at the option of the *cestui que trust*, to pay interest at the highest rates, and with yearly rests, or compounded. But it is only in cases of gross misconduct; never for a mere neglect of duty, as for not investing the trust funds, but letting them lie idle. *McKnight's Ex'rs v. Walsh*, 136.
4. A trustee cannot be called to account for the profits of a business in which the fund was originally invested lawfully, merely because he neglected to withdraw it from that business. *Ib.*
5. But where a part of the trust fund consists of moneys advanced to the trustee, and the trustee, in violation of the testator's directions, neglects to invest, and continues to use the money in his own business, and where, by not paying in his debt, he is enabled to keep certain railroad shares, of which he actually received the income half yearly, the trustee will be charged with annual rests and compound interest. The excess on the half yearly interest in this case being too small for investment, the trustee will only be held for the yearly rests. *Ib.*
6. Where a trustee, in violation of the trust, fails to invest the fund, and uses it in his own business, he is not entitled to commissions. *Ib.*
7. Where the executor was a debtor of the testator, and a trust fund established by the testator consists of the debt, which the executor has never paid into the estate, but upon which he paid the interest as it accrued, he is not entitled to commissions. *Ib.*
8. An executor or his representative is not entitled to commissions on any part of the assets not collected. *Ib.*
9. The principal of a specific sum bequeathed as a trust fund is not liable to commissions; they must come out of the residue of the estate. *Ib.*
10. The executor, by agreement with the infant's father, having kept \$1000 as commissions, the amount must be included in the balance on which compound interest is to be computed. *Ib.*
11. A *cestui que trust* is entitled to have the interest on the fund held in trust for her paid to her yearly, without any deductions for commissions, until commissions are allowed and settled by the proper court. *Lathrop v. Smalley's Ex'rs*, 192.
12. A trustee who uses the trust fund in his own business, like any other debtor, must seek the *cestui que trust* to pay the interest. *Ib.*
13. A trustee who, contrary to the directions of the will, fails to invest the fund, and in flagrant violation of the trust, uses the money in his own business, is not entitled to commissions. *Ib.*
14. The trustee using the trust fund having retained the interest, must pay interest upon it from the day it became due. *Ib.*
15. A trustee will not be removed for every violation of duty. For acts done in bad faith, or that have di-

- minished or endangered the trust fund without bad faith, it is the duty of the court to remove him. *Ib.*
16. But when it appears that the trustee is a responsible man, of large property, and engaged in no hazardous business, and that the fund has not been in any danger, and that he supposed the money was safe in his hands as in any investment he could make, and that retaining it would save expenses to the fund, his good faith is not impeached, and he will not be removed. *Ib.*
17. Whether a co-trustee who has paid no attention to the fund, but left its administration entirely in the hands of the acting trustee, will be removed, depends upon the conduct of the acting trustee. Under the circumstances of this case, he will not be removed. *Ib.*
18. Vexatious and troublesome conduct on the part of a trustee may be good ground for removing him from the trust, but held insufficient for that purpose in this case. *Ib.*
19. The fund must be invested on bond and mortgage at the highest rate of interest allowed by law, if such investment can be procured, and so as not to be subject to taxes if the trustee resides in a part of the state where such exemption exists. *Ib.*
20. Costs to be paid by trustees out of their own estate. *Ib.*
21. If an administrator or other trustee, directly or indirectly, purchase lands at a sale made by himself as such, the sale will be set aside on application of the parties really interested. *Smith v. Drake*, 302
22. When it is necessary that lands held in trust should be sold, and the trustee is in a situation that induces him to give more than any other purchaser would give, the court may authorize a sale by him, at a full, fair price to be approved by the court, to himself or to some one for his benefit. *Colgate's Ex'r v. Colgate*, 372
23. When a member of a firm holds lands in trust, and it is necessary that they should be sold, and the firm are willing to give full value for them, the court will order a sale and conveyance by the trustee, to or in trust for such firm. *Ib.*
- See MASTER'S REPORT, 6, 8, 10.
RELIGIOUS SOCIETY, 4.
- UNILATERAL CONTRACT.
- See SPECIFIC PERFORMANCE, 11, 17.
- USURY.
1. Where an illegal reservation has been made by the mortgagee, and the mortgagor afterwards effected a new loan by the assignment of the mortgage, representing it to be good, he is precluded from setting up the original usury against the assignee and those claiming under him. *Coult v. McCarty*, 126
2. Usury in the contract between the mortgagor and the assignee being proved, the amount of bonus paid directed to be deducted from the principal of the mortgage, and a decree for the balance allowed, without costs, and without interest on the balance of principal from the time interest was last paid. *Ib.*
3. The mortgage being given for \$800, when, by agreement, only \$700 was advanced, is usurious. The amount actually advanced only can be recovered, without interest or costs. *Bennett v. Hadsell*, 174
4. The assignee, even without notice of usury, takes subject to that defence. *Ib.*

- all money and property devised and bequeathed to any of them, until they arrive at a specified age. But the administrator of such deceased child is entitled to receive the shares of such next of kin as are not within that age, for distribution to them. *Ib.*
11. A direction to pay the income of each child to its mother for its support until it is entitled to its share, will not be held to direct such payment after the death of the child until the others arrive at the age specified for receiving their share. The direction being to pay for its support is terminated by its death. *Ib.*
12. Where a will directs the executors to erect and maintain a fence around a cemetery, and charges all legacies and expenses directed by it upon lands devised, the executors can maintain a suit in equity against the devisees of the land, or their assigns, for the expenses of erecting such fence. Whether they can maintain such suit for legacies charged on the land—*Querre. Conl's Ex'rs v. Higgins*, 308.
13. A tenant for a term of years under a will released her term to the executor, and authorized him to sell the premises in the manner directed in the will. The testator had directed the executor to sell at the expiration of the term, or at the death of the tenant before. The tenant, being advised that the executor had power to convey the premises, upon the surrender of her term, purchased them, paid the price, and took a deed therefor. While occupying the premises she had paid off a mortgage, given by the testator, and taken an assignment of it. The testator was also otherwise in debt to the tenant. *Held*—
1. The deed to the tenant is void.
 2. The deed being void, the tenant's right to enjoy the premises is not divested, unless the release has that effect.
 3. If the release has any other effect than merely to enable the executor to make sale before the expiration of the term, the tenant is entitled to have it canceled and delivered up.
 4. The premises not having been sold, the tenant is entitled to no relief against the release. The testator's heirs not being privy to it, they can take no title through it.
 5. The tenant is not entitled as against the executor, to be subrogated to the rights of creditors whose debts were discharged with the money paid for the premises. Those debts were actually paid and discharged by him as executor for the estate, and cannot be recovered from him. *Hampton v. Nicholson*, 423.
14. Where it does not appear whether the testator did or did not sign the will or acknowledge the signature to be his in the presence of the witnesses, but the testator, after his name was signed to the will, declared it to be his will, and asked them to sign it as witnesses, and the attestation clause is in the handwriting of the testator and declares that it was signed in the presence of witnesses, the certificate must be taken as true, and as proof of signing in their presence. *In re Alpaugh's Will*, 507.

See DEVISE.
LEGACY.

WITNESS.

The credibility of a witness is not affected by the fact that he is sixty-five years old. *Smith v. Drake*, 302.

See WILL, 14.
PRACTICE, 11, 12.



